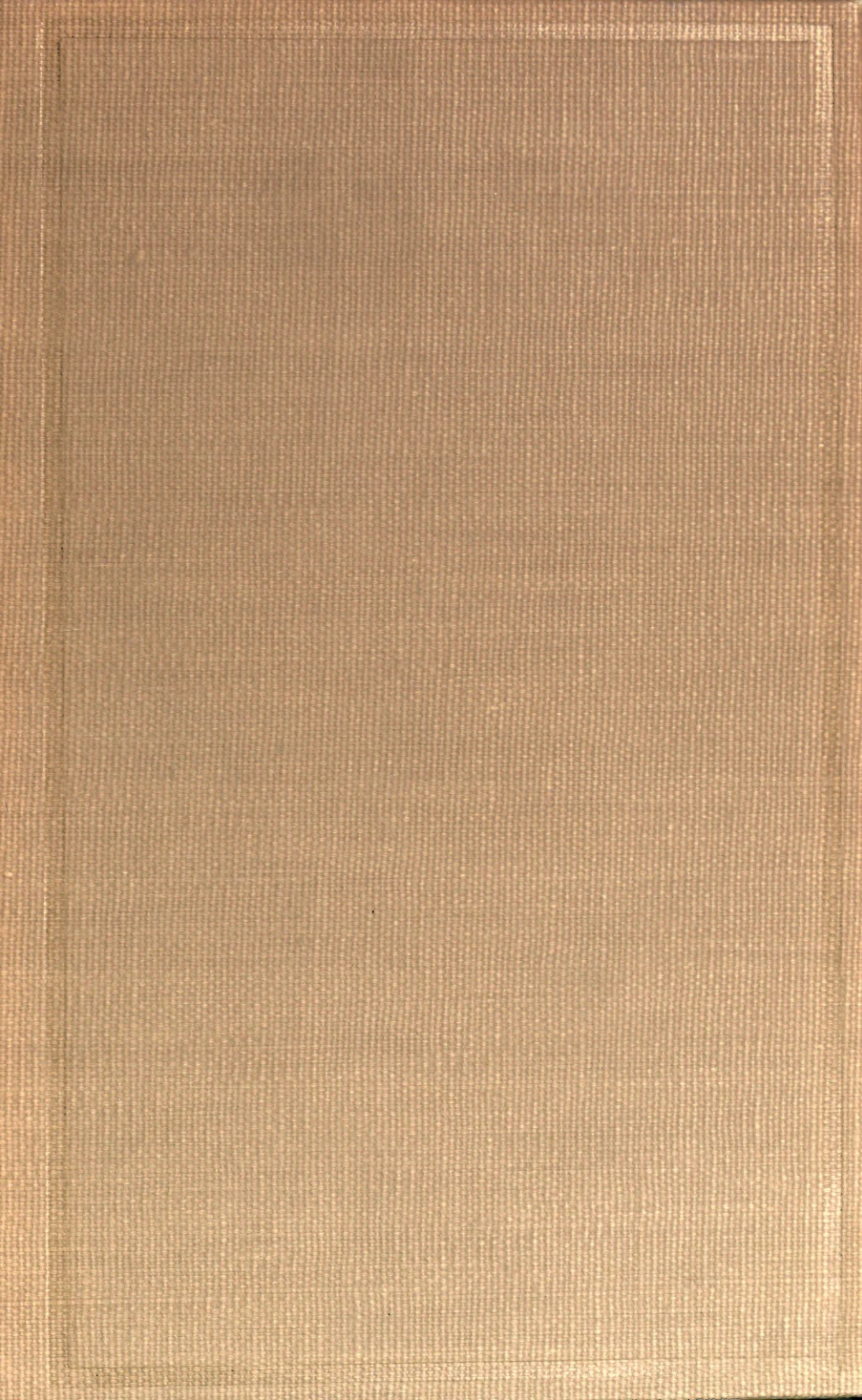






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FOREWORD PAGE

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CRANCH CIRCUIT COURT REPORTS

VOLUME 5

1836-1841

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Buffalo, N. Y.
February, 1951

DENNIS & CO., INC.

REPORTS
OF
CASES
CIVIL AND CRIMINAL
IN THE
UNITED STATES CIRCUIT COURT
OF
THE DISTRICT OF COLUMBIA,
FROM 1801 TO 1841.
IN SIX VOLUMES.

BY WILLIAM CRANCH,
CHIEF JUDGE OF THE COURT.

VOLUME V.
1836 TO 1841.

BOSTON:
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JUDGES
OF THE
UNITED STATES CIRCUIT COURT,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM CRANCH, CHIEF JUDGE.
HON. BUCKNER THRUSTON, } ASSISTANT
HON. JAMES SEWALL MORSELL, } JUDGES.

DISTRICT ATTORNEY.

F. S. KEY, Esq.

MARSHAL.

ALEXANDER HUNTER, Esq.

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CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1836, AT WASHINGTON.

RACHEL JACKSON *v.* BANK OF THE UNITED STATES *et. al.*

A judgment binds lands subsequently acquired.

If the judgment be revived between the original parties, it is not necessary to issue a *scire facias* against the terre-tenants who purchased more than a year after the judgment, and before its revival; nor is it necessary, during the life of the original defendant, to issue any *scire facias* to his vendees who purchased after the judgment; nor to bring in all the terre-tenants; nor is it material that the debtor was solvent for a long time after the judgment; for purchasers are bound to take notice of judgments on record.

It is no objection that the judgment is of twelve years' standing, if it has been revived within the twelve years, and twelve years have not elapsed since its revival.

It seems that a purchaser of lands bound by a judgment against the vendor, may move to quash the execution upon its return, or may have an *audita querela*.

BILL for injunction to stay execution levied upon land sold by the debtor after judgment, and while it was dead or sleeping. There was also a motion at law to quash the return of the *fieri facias*.

The bill states that the complainant is owner of lot No. 9, in Threlkeld's Addition to Georgetown, on which the marshal recently levied a *fieri facias*, issued upon a judgment in favor of Jeremiah Bronaugh against John W. Bronaugh and Henry Suttle, rendered in June term, 1811, and recently entered for the use of the Bank of the United States.

That on the 18th of September, 1816, the lot was conveyed to John W. Bronaugh.

That on the 23d of January, 1819, he conveyed it to Thomas G. Moncure, in trust to pay certain judgments rendered against the said John W. Bronaugh at June term, 1818.

That on the 14th of June, 1819, Joseph Jackson, the complainant's husband, purchased the lot at the sale under that deed of trust, and died seized on the 21st of May, 1831.

That he purchased it *bonâ fide*, for valuable consideration, without notice of the judgment of 1811, and in full confidence

Jackson v. Bank of the United States.

that it was sold for the satisfaction, as far as it would go, of all the judgments which bound it.

That it was devised, in fee, to the complainant, by her husband; that she immediately took possession of it, and has held it ever since.

That on the 4th of August, 1831, the execution was levied upon it.

That on the 15th of June, 1811, the judgment was rendered upon which the execution was issued for eighty-six dollars, with interest from the 24th of October, 1809, and costs, \$18.69.

That on the 20th of November, 1820, the said John W. Bronaugh was discharged under the insolvent act; and that Jeremiah Bronaugh, the plaintiff in that judgment, was appointed his trustee, and issued a *scire facias* against the said John W. Bronaugh and Henry Suttle, returnable to April term, 1821, to revive the judgment, and on the 9th of April, 1821, execution was thereupon awarded against them, but not issued; and no *scire facias* was issued against the said Joseph Jackson or any other terre-tenant; and the judgment was suffered again to expire; and that it thus remained until the 19th of March, 1829, when the said Jeremiah Bronaugh, having purchased other lots bound by the same judgment, and being indebted to the Bank of the United States, caused the judgment to be entered for the use of that bank, on the docket, but that it still remained dead and barred, and "above 12 years' standing," and no longer "good and pleadable," or capable of being given in evidence, until the 11th of February, 1830, when another *scire facias* to revive the judgment was issued against the said John W. Bronaugh and Henry Suttle only, to show cause why execution should not issue against them, their lands, tenements, goods, and chattels; and neither the said Joseph Jackson, the tenant in possession, nor any other terre-tenant had notice. That on the 6th of December, 1830, Suttle's death was suggested, and execution was awarded against John W. Bronaugh alone, as survivor of the said Henry Suttle, and not of the lands of which he was seized at the time of the judgment, &c.

That on the 1st of August, 1831, the first execution was issued on the original judgment commanding the debt and costs to be made "of the goods and chattels, lands and tenements of the said John W. Bronaugh," under which execution the complainant's lot was seized, &c.

That Jackson's purchase under the deed of trust from John W. Bronaugh, was known to his brother, the said Jeremiah Bronaugh, at the time; and that he knew of that deed of trust and the sale under it.

That it was irregular to issue the *scire facias* after the judgment had been standing more than eighteen years, without the previous leave of the Court, or even after twelve years, without *scire facias* to the tenant in possession.

That the said Jackson had a valid defence at law against the said judgment, which the said parties well knew, but of which he was deprived by their omission to make him a party to the *scire facias*; namely, the presumption of payment arising from all the circumstances of the case, as well as the statute of limitations.

That there are other lands equally bound by the judgment, namely, lots 100 and 110 in Threlkeld's Addition to Georgetown, now owned by the Bank of the United States, &c., &c., stating many other lots.

That the complainant is entitled to call the said Jeremiah Bronaugh to account for the property of John W. Bronaugh, assigned to him as trustee, under the insolvent act, before he can enforce his judgment against John W. Bronaugh, or his property in the hands of the complainant.

The bill then prays that the levy of the *fieri facias* on the complainant's property may be quashed; or that the "*fiat*" may be opened, and the complainant and other terre-tenants made parties; or a perpetual injunction, that the account of Jeremiah Bronaugh, as trustee of J. W. Bronaugh, may be exhibited and settled; that the terre-tenants named in the bill may be brought in to contribute, and for general relief. An injunction was granted by the chief judge on the 26th of August, 1831.

To this bill the Bank of the United States demurred for want of equity, and moved to dissolve the injunction.

The cause was set for hearing upon this motion and upon the demurrer, at March term, 1836, and was heard in the absence of THRUSTON, J.

Mr. R. S. Coxe, for the defendants, contended,

1st. That the judgment bound lands subsequently acquired.

2d. That in no case is it necessary to issue *scire facias* against terre-tenants in the lifetime of the original debtor. The purchasers whose lands are sold under the *fieri facias*, must look to the debtor for indemnity, and cannot compel other purchasers to contribute.

3d. That, therefore, it is immaterial whether there were other terre-tenants of other lands bound by the same judgment.

4th. That it was immaterial that the debtor remained solvent for a long time after the judgment. That fact did not invalidate the lien created by the judgment.

5th. That the plea of purchase, without notice of the judg-

ment, cannot be sustained, because every purchaser is bound to take notice of a judgment of record.

6th. That the plea of limitation, as to the judgment being of "12 years' standing," could not be supported, for the judgment was revived before the twelve years had elapsed, and it is to be considered as a new judgment when revived, as this Court decided in the case of *Digges v. Eliason*, at November term, 1835, and twelve years had not elapsed since the revival, before the execution was issued.

Mr. Redin, contra. This case differs from that of *Digges v. Eliason*. There it was against the original parties; there was no terre-tenant. But here there is a terre-tenant; a *bonâ fide* purchaser without notice. This point was not decided by the Court in that case.

If the land be aliened after judgment, there must be a *scire facias* against the alienee before his land can be seized and sold under a *fi. fa.* *Arnott v. Nicholls*, 1 Har. & Johns. 471, 476. The note to that case, in p. 476, is not true to the extent stated. That case was not overruled by the case of *McElderry v. Smith*, in 2 Har. & Johns. 72. This latter case only decided that a *scire facias* to the terre-tenant is not necessary if the alienation is made pending the *scire facias*, to revive the judgment against the original debtor. In the present case, the revival in 1821 was a nullity, because not proceeded upon by execution. 6 Bac. Ab. 114, Wilson's Ed.; *Vanderhagen v. Gardner*, 9 Johns. 79.

Jeremiah Bronaugh, the plaintiff in the judgment, was trustee of his brother, John W. Bronaugh, under the insolvent act, and had funds applicable to this debt, and there has been no settlement of his trusteeship. This Court decided in *Law's case*, that the judgment creditor cannot enforce his judgment lien by execution, but may have priority of payment out of the proceeds.

Jeremiah Bronaugh purchased some of the other lots equally liable to this judgment. All who purchased lands of the debtor after the judgment are equally liable, and must bear their proportion.

CRANCH, C. J., said: I think the plaintiff at law, Jeremiah Bronaugh, cannot enforce his lien upon the land in the possession and seizin of Mrs. Jackson, by *fieri facias*, without a previous *scire facias* against her. The case of *Arnott and Copper v. Nicholls*, 1 Har. & Johns. 471, is not overruled by that of *McElderry v. Smith*, 2 Har. & Johns. 72, so far as the former case establishes the general rule that the plaintiff shall not charge the lands in the seizin of a *bonâ fide* alienee, without *scire facias*. The case of *McElderry v. Smith*, establishes an exception only where the alienation is made pending the *scire facias* against

the debtor to revive the judgment. In the case of *Morton v. Croghan*, 20 Johns. 120, it was held, that "where the judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding."

The equity of the case is, that Mrs. Jackson has no remedy at law; for, not being a party to the original judgment, she cannot have an *audita querela*, nor a motion to quash the return.

I think, therefore, that the demurrer and motion should be overruled, and the injunction should stand until Mr. Bronaugh, or the bank, to whom it is said the judgment is assigned, shall, upon a *scire facias* against Mrs. Jackson, establish his or their right to levy the *fieri facias* on her land.

MORSELL, J., did not concur, and THRUSTON, J., not having heard the argument, the case was continued to this term for further argument.

The case was argued again on Tuesday and Wednesday, November 29 and 30, 1836.

Mr. R. S. Coxe, for the defendant, contended that the only case in which, in England, a *scire facias* to terre-tenants is necessary, is where an *elegit* has been issued, and the debtor is returned, "dead;" and that no *scire facias* can be issued against the terre-tenants in the life of the debtor. Fitz. Nat. Bre. p. 597, fol. 267, D., also p. 595, fol. 266, C. note a; 2 Williams's Saunders, 6, note 1; 6 Com. Dig. 519; 2 Tidd, 1030; *Jackson v. Shaffer*, 11 Johns. 516; *Young v. Taylor*, 2 Binney, 218.

Mr. Redin, contra, contended that the rule is, that where the land of a *bonâ fide* purchaser is to be charged by a judgment against the vendor, there must be a *scire facias* to such purchaser as terre-tenant, to come in and show cause why the plaintiff should not have execution of his lands; and he stated that such had always been his practice. In *Arnott and Copper v. Nicholls*, 1 Har. & Johns. 471, this rule is recognized by the court; and although the reporter has stated that it was overruled in *McEl-derry v. Smith*, 2 Har. & Johns. 72, yet in the latter case, the court only decided that a *scire facias* is not necessary when the alienation is made pending the *scire facias* to revive the judgment against the debtor. In *Webster v. Saunders, Terre-tenant of Duley*, the *scire facias* was against the terre-tenant, although it does not appear that either party to the original judgment was dead.

So in *Ridgeley v. Gartrell, Terre-tenant of Burgess*, 3 Harris & McHenry, 449.

In *Hammond v. Gaither's Heir and Devisee*, 3 Har. & McHenry,

218, the devisee had aliened the land before the suit was brought, for valuable consideration, and that fact was pleaded; to which the plaintiff demurred. A doubt was suggested, whether the plaintiff could have execution against the land without a *scire facias* to the vendee; but the answer was, that the devise itself was void by the Statute of Devises, 3 & 4 W. & M. c. 14, as to creditors, so that there was no alienation of the land, but it descended to the heir.

In 2 Harris's Entries, 763, is the form of a *scire facias* against the original defendant and his terre-tenants, in the lifetime of the original parties, and, in a note, he says, the *scire facias* ought to issue against the original defendant and terre-tenants jointly; and he cites Carthew, 107, and 3 Co. 11.

So in *Tully and wife v. Marwood*, Comb. 318, the Court refused to render judgment against the conusees of a fine without *scire facias* to the terre-tenants. So also in *Pembroke's case*, Skinner, 107, 112.

In *Morton v. Croghan*, 20 Johns. 106, Judge Spencer, in delivering the opinion of the court, after saying that the law applicable to the case was laid down with entire precision by Sergeant Williams in his 4th note to 2 Saund. 51, a, and referring to *Harbert's case*, 3 Co. 11, and several other cases, says: "I apprehend the law to be well settled, that since the statute of West. 2, where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land a party to the proceeding."

It is true that in a preceding case, *Jackson v. Shaffer*, 11 Johns. 516, cited by *Mr. Coxe*, Mr. Justice Van Ness, in delivering the opinion of the court, said, "It is in the case of the death of the original defendant that the terre-tenants are to be made parties, and not where the original defendant is living;" but he is not supported by the authorities which he cited, namely, *Tidd's Prac.* 1021, 1023; 2 Saund. 7, n. 4.

The case of *Young v. Taylor*, cited by *Mr. Coxe* from 2 Binney, 228, is not applicable to the present case, for the decision was upon the peculiar statute of Pennsylvania of 1705, making lands liable to be sold under a *feri facias*.

Mr. Redin, also contended that the decision of this court in *Digges v. Eliason*, that a revival by *scire facias* makes it a new judgment, cannot apply to the case of a purchaser without notice; or if it can, the new judgment is subsequent to the purchase, and therefore cannot bind the land. That under the circumstances of the case there was a strong presumption that the judgment had been satisfied; *Mayor of Hull v. Horner*, Cowp.

109; Phil. on Evidence, 114; and that Mrs. Jackson ought to have a day in court, either at law or in equity, to show it.

She has a right to call upon the other terre-tenants for contribution. At the time of Jackson's purchase in 1819, there were lots in Georgetown unincumbered, and in possession of the debtor, and equity will restrain the plaintiff to unincumbered property. *Clowes v. Dickenson*, 5 Johns. Ch. Rep. 236; *Shepard v. Shepard*, 7 Johns. Ch. Rep. 62.

Mr. R. S. Coxe, in reply, contended that, if the Court should decide that a *scire facias* to the terre-tenant is necessary in the lifetime of the original debtor, it would disturb many titles in this county.

If the proceeding is erroneous at law, the remedy is not in equity; but the party grieved by an execution may have an *audita querela*, although he was no party to the judgment. *Mitchell v. Croft*, Cro. Jac. 506.

Harris, in a note to the precedent of a *scire facias*, vol. 2, p. 763, refers to *Panton v. Terre-tenants of Hall*, in Carth. 107, and to *Pembroke's case* in Skinner, 273, which was a *scire facias* to hear errors upon a common recovery, and therefore not applicable to the present case.

In the case of *Ridgeley v. Gartrell, Terre-tenant of Burgess*, 3 Har. & Johns. 449, it does not appear that Burgess was alive at the time of the *scire facias*.

The case of *Arnott and Copper v. Nicholls*, was upon a motion to quash, not a bill in equity, but it was reversed by the case of *McElderry v. Smith*.

In the case of *Tayloe v. Thompson's Lessee*, 5 Peters, 358, the execution against Glover was levied on land sold by him after the judgment without making the terre-tenant a party by *scire facias*.

(*Mr. Redin*, there no *scire facias* had been necessary to revive the judgment.)

Dec. 1, 1836. The COURT dissolved the injunction for want of equity in the bill; saying that the complainant might move to quash the return of the *fieri facias*, or might have an *audita querela*. CRANCH, C. J., gave no opinion, not having had time to consider the case since this argument, and not being satisfied that his former opinion was not correct.

In 2 Saund. 6, note 1, in the case of *Jeffreson v. Morton*, Sergeant Williams says, "Though the plaintiff should die within the year after judgment, his personal representative cannot have execution against the defendant without *scire facias*. Fitz. Execution, 243; 15 H. 7, 16, b; 1 Roll. Ab. 900, P. pl. 1, 2. Nor, in case of the death of the defendant, within that period, can the

plaintiff have an *elegit* under the statute of West. 2, c. 18, against his lands in the hands of his heir or terre-tenants; or generally any other execution, without a *scire facias* against his heir and terre-tenants, or personal representatives" — "the rule being that where a new person, who was not party to a judgment or recognizance, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make him party to the judgment or recognizance. *Penoyer v. Brace*, 1 Lord Raym. 245; S. C. 1 Salk. 319, 320; 2 Lord Raym. 768; *Queen v. Ford*, 2 Inst. 471." In *Isams's case*, Moore, 367, it is said, "If two recover and one die, a *scire facias* shall issue against the defendant before execution shall issue, because he may have a release of the dead one to plead. *Quod fuit concessum.*"

In Fitz. N. B. p. 597, fol. 267, D, he says, "If a man be bound in a recognizance in chancery, or other court of record, and afterwards the recognizee dieth, his executors may sue forth an *elegit* to have execution of the lands of the recognizor; and if the sheriff return that the recognizor is dead, then the executors shall have a special *scire facias* against the heir of the recognizor, and against those who are tenants of the lands which he had at the day of the recognizance made;" and after giving the form of the writ, he says, "and thereby appeareth that if a man be bounden in a recognizance, &c., although the recognizee dieth, yet his executors cannot sue forth an *elegit* to have execution of the recognizance, within the year after the day of payment, without suing forth a *scire facias* against the recognizor, &c. But against the heir of the recognizor, or the terre-tenants, the recognizee or his executors ought to sue forth a *scire facias* &c., otherwise, if they be ousted, &c., by such execution of their lands, they shall have an assize of novel disseisin," &c.

And in page 595, fol. 266, C, Fitzherbert says, "And after the year and day of payment passed of the recognizance, the recognizee ought for to sue a *scire facias* against the recognizor to show what he can say why the recognizee should not have execution; and if he be returned upon that writ warned by the sheriff, if he do not appear, or if he do appear and cannot say any thing wherefore he should not have execution, then the recognizee may sue forth the writ of *elegit* to have execution of all his goods, and of the moiety of his lands; and if the sheriff return the *elegit*, that the recognizor hath made a feoffment in fee of part of the lands, to divers tenants, &c., and that he hath enfeoffed the king of the residue; then, upon that return, the lands, whereof the king is seized by that feoffment, are discharged. But he may sue a *scire facias* to warn the other tenants to appear at a certain day to show cause wherefore the said lands

should not be delivered in execution ; and if they be warned and do not appear, or if they come and cannot say any thing, &c., to bar the execution, then the recognizee shall have execution against them of those lands, by writ of *elegit*, &c. But he shall have the *elegit* before that he sueth the *scire facias* against those tenants." That is, as I understand him, the recognizee shall first have an *elegit* against the recognizer, and if the sheriff returns that the recognizer has aliened his lands to divers tenants, the recognizee may then have his *scire facias* against those tenants.

Here, then, it appears that if the recognizer aliens his lands, the recognizee may have a *scire facias* against the terre-tenants of the recognizer in his lifetime.

The rule to be derived from these two passages of Fitzherbert, is, that if the sheriff return upon the *elegit* or the *levari facias*, (which were the only writs of execution which could affect the lands in England,) that the debtor is dead, or has aliened his lands to divers tenants, the plaintiff must sue a *scire facias* to the terre-tenants before he can take their lands in execution ; and there is as much reason for a *scire facias* against the terre-tenants in case of alienation, as there is in case of the death of the debtor. They are "not parties to the judgment;" they are "new persons," (according to the rule laid down by Sergeant Williams in his note to Saunders,) "chargeable to the execution," and, therefore, must have a day in court to show cause why their lands should not be liable to the execution. There are many things which may be pleaded in bar of the execution, such as satisfaction ; or a release ; or that the debtor was not seized on the day of the judgment, nor at any time since ; or that there are other tenants not named ; or non-tenure of the freehold, &c. Nothing can be more just than that they should have an opportunity to show these things, which they cannot do without a *scire facias*. Being no parties to the record, they have no standing in court ; nor can they, of right, make any motion in the cause. A *feri facias* is said to be not a returnable writ ; it gives no day in court, even to the parties.

Lord Coke, in 2 Inst. 471, says, "One that is not a party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit ; and so likewise of the tenant's or defendant's part, for the alteration of the person altereth the process ; otherwise it is of a statute staple or merchant, &c., because the process is given by other acts of parliament."

By the statutes which gave the statute merchant, the statute

staple, and the recognizance in the nature of a statute staple, the creditor may, at any time after forfeiture, without *scire facias*, have execution of the lands which his debtor had at the time of the recognizance acknowledged, in whose hands soever they may have come, either by feoffment or otherwise; but the provisions of those statutes do not apply to recognizances and judgments at law, taken or rendered in the court of chancery or in the courts of common law. See 11 Eliz. 1, Stat. *De Mercatoribus*; 13 Eliz. 1, st. 3; 27 Eliz. 3, st. 2, c. 9, and 23 H. 8, c. 6.

In 4 Inst. 396, Lord Coke says, "Upon the equal construction of these words" (*medietatem terræ suæ*) "if the conusor be seized of black-acre, white-acre, and green-acre, and after judgment given or recognizance knowledge, enfeoffeth A. of white-acre, and B. of black-acre, and retains green-acre to himself; in this case he" (the conusee) "may have the moiety of green-acre, and never intermeddle with the rest; but he cannot extend the moiety of the acre in the hand of any purchaser, except he extend also a moiety of all the land subject to the judgment or recognizance; and if he omit any, the extent shall be avoided in an *audita querela*; for where it is said in books that each purchaser shall have contribution in that case, the meaning is that such extent of part shall be avoided, and all the land extended and equally charged." "So likewise, if there be two or more conusors, the lands of them all must be extended; and hereof you may read at large in *Sir W. Harbert's case*; all which are just and righteous expositions."

In *Sir W. Harbert's case*, 3 Co. 12, b, he says, the heir, in general, shall not have contribution against the terre-tenants, because he is "*pars patris*," "*alter ipse*;" but if the land descend to two parceners, "who make partition in this case, if one only be charged, she shall have contribution; for as one purchaser shall have contribution against another, and against the heir of the conusor also, so one heir shall have contribution against another, for they are "*in æquali jure*." And in folio 14, a, he says, "For in executions which concern the realty, and charge the lands, the sheriff cannot do execution on the land of one only."

And again in folio 14, b, he says, "So it appears by these cases, that when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burden; and the law, in this point, is founded on great equity. But in all the cases at the common law, if the party who should be charged (as the heir, &c.,) had aliened the land *bonâ fide*, before any action brought, the land, in the hands of the purchaser, was not subject to any charge or execution, and this was the reason why the judges and sages of the law, in the construction of the

said statutes, although the lands of purchasers, after the judgment recognizance or statute were subject to execution, yet gave greater privileges to them than to the conusor himself, or to his heir.

“And the reason why the conusor himself, at the will of the conusee may be only charged, is because he himself is the person who was the debtor, and who was bound, and therefore he is subject to execution; and it is but reasonable that he may be only charged; the same law for his heir, for the reasons before rehearsed.

“Note, reader; when it is said before, and often in our books, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended that the party who is only extended for the whole, may, by *audita querela*, or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner every one shall be contributory — *hoc est*, the land of every terre-tenant shall be equally extended.”

So also in the case of *Mallory v. Jennings et al.* 2 Anderson's Reports, p. 160, case lxxxviii. “it was said by all the judges in bank, that the execution did not bind the vendee, because the writ is not brought against the tenant of the land; and always, if the inheritance or freehold is to be charged by any suit, or by reason of any writ, the tenant of the freehold ought to be the party against whom the writ should be brought; which is not so in this case; for the vendee upon the matter, is tenant of the freehold, and not Sewster,” who was the debtor, and who sold and conveyed the land after the recognizance acknowledged.

Tidd, 1021, says, “it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a *scire facias*.”

So in *Pennoyer v. Brace*, Salk. 319, 320, it is said, “where any new person is either to be better or worse by the execution, there must be a *scire facias*, (because he is a stranger,) to make him party to the judgment.” S. C. 1 Lord Raym. 244.

And in *Morton v. Croghan*, Mr. Justice Spencer, in delivering the opinion of the court, said, “I apprehend the law to be well settled, since the statute of West. 2, that where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land, a party to the proceeding; and in this case the judgment against Croghan being

a lien on the real estate in the hands of the terre-tenants, the plaintiffs are required by law to make all the terre-tenants parties to the *scire facias*, to the end that they may be jointly contributory to the satisfaction and payment of the judgment.

“ This has been shown to be the established principle under the statute of West, 2, which gave the creditor his remedy by the execution of *elegit*, under which he held a moiety of the debtor's lands, until he was satisfied his debt and damages. At common law the *fieri facias* went merely against the goods and chattels of the debtor; such an execution, therefore, related merely to the personalty; but under our statute, which subjects the lands and tenements of the debtor to be sold absolutely, for the satisfaction of the debt, it is ordinarily an execution partly in the personalty and partly in the realty; and in the present instance is entirely in the realty; for the goods and chattels of the terre-tenants cannot be affected by the judgment, or any execution under it. The same principle which required the *eligit* to issue against all who ought to bear the burden, applies with much more force to the *fieri facias* against the lands; for in the former case they were not to be sold; but a moiety only held until the debt was paid; whereas in the latter case they are liable to be taken away forever from the debtor. Besides, the principle is most just and equitable. If the creditor, having the lien, can select a few, as in this case, to bear the whole burden, they may probably be crushed by its weight; but if he must render them all contributory, the individual burden may be borne without ruin.”

In *Webster v. Saunders, Terre-tenant of Duley*, 4 Har. & Johns. 287, and in *Ridgeley v. Gartrell, Terre-tenant of Burgess*, it does not appear that the original parties, or any of them, were dead. This shows what the practice has been in Maryland; and in *Arnott and Copper v. Nicholls*, 1 Har. & Johns. 471, 473, the court said, “ The terre-tenant should have an opportunity to relieve himself, and to bring in the other terre-tenants. Hence the necessity of a *scire facias*, that all the terre-tenants may be warned.”

But that case, it is contended, was overruled by *McElderry v. Smith*, 2 Har. & Johns. 72. The latter case, however, does not profess to overrule the former, and it only decides that a *scire facias* to the vendee is not necessary where the alienation is made pending the *scire facias* against the vendor to revive the judgment.

In the case of *Jackson v. Shaffer*, 11 Johnson, 516, Mr. Justice Van Ness, who delivered the opinion of the court, said;

“ It was not necessary to make the terre-tenants parties. Here the plaintiff, having laid by for more than a year and a day after

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he had obtained judgment, it became necessary to revive it against the original defendants, which, when revived, was of the same force and effect, and, of course, liable to be proceeded upon, in the same manner as if the time within which an execution might have been legally issued, had not been suffered to elapse. It is in the case of the death of the original defendant, that the terre-tenants are to be made parties; and not where the original defendant is living. Tidd's Pr. 1021, 1023; 2 Saund. 7, n. 4."

This is the only case in which it has been said that the terre-tenants are not to be cited in the lifetime of the debtor; and the authorities cited (Tidd and Williams's Saunders) do not support the decision. They only say that, in case of the death of the debtor, the terre-tenants may, and must, be cited before the plaintiff can have execution of their lands. But according to the law as laid down in the authorities before cited, namely, Fitzherbert, N. B. p. 595, folio 266, E.; 2 Saund. 6, n. 1; 2 Inst. 471; 4 Inst. 396; *Harbert's case*, 4 Co. 12, b, and 14 a, and b; *Mallory v. Jennings*, 2 Anderson, 160. Tidd, 1021; *Pennoir v. Brace*, 1 Saund. 319, 320; *Morton v. Croghan*, 20 Johns. 121; *Webster v. Saunders*, *Terre-tenant of Duley*; 4 Har. & J. 287; *Ridgely v. Gartrell*, *Terre-tenant of Burgess*, 3 Har. & McHenry, 449; *Arnott & Cooper v. Nicholls*, 2 Harris, Ent. 763; it seems to me that the doctrine so distinctly laid down by Mr. Justice Spencer in *Morton v. Croghan*, cannot be now controverted, that "where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person, having a fee in the land, a party to the proceeding." See also Co. Ent. folio 623, a.; Dyer 331, b, pl. 23 and 332, a, pl. 24.

I think the complainant was entitled to relief, but whether by bill in equity I doubt.

No relief, however, appears to have been given.

ISAAC N. CAREY v. THE CORPORATION OF WASHINGTON.

The corporation of Washington has no power to prohibit free colored persons from selling perfumery.

Quære, whether they have authority to require any person to take a license to sell perfumery.

The corporation has no power to restrain or prohibit any person from the full exercise of all his rights, under the general law of the land, unless the power so to restrain or prohibit is expressly given by the charter, or necessarily results from some given express power.

APPEAL from the judgment of a justice of the peace for the County of Washington.

The warrant, dated on the 23d, and returnable on the 24th

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of November, 1836, was to arrest the defendant, &c., to answer to the mayor, board of aldermen and board of common council of the city of Washington in a plea that he render unto them the full sum of fifty dollars which he owes and unjustly detains, "for that he the said Isaac N. Carey, being a free negro, did, on the 22d day of November, 1836, sell perfumery in the city of Washington, without first having obtained a license therefor, contrary to the act or acts of said mayor, &c., on that subject made and provided."

Mr. Dandridge and *Mr. W. L. Brent* for the appellant, and *Mr. Bradley* for the appellees, admitted the following facts;

That the appellant was residing in the city of Washington before the 29th of October, 1836, and had complied with the requisitions of the by-law of 1827, respecting the admission and residence of free colored persons. That he kept and sold perfumery, and paid for a license therefor previous to the said 29th of October, 1836, and that his said license expired on the first Monday of November, 1836. That he applied to the mayor of Washington for a renewal of his said license on or before that day, who refused to grant such license under the ordinance of the 29th of October, 1836. That he continued to keep and sell perfumery after the expiration of his said license.

The justice rendered judgment for a fine of 25 dollars, from which judgment the defendant appealed.

This fine was imposed under the by-law of the 28th of October, 1831, entitled "an act providing additional revenues for the corporation," by the 1st section of which it is enacted that the taxes on certain licenses therein enumerated should be fixed at certain rates, and among others the following; "On each license to sell hardware, medicines, perfumery, jewelry, and watches, twenty dollars."

And by the third section it is enacted, "That if any person or persons shall sell, barter, or keep, as in the first section of this act enumerated, without first obtaining a license therefor, he, she, or they shall forfeit and pay, for each and every offence, a fine not less than ten nor more than fifty dollars, to be recovered and disposed of as are other fines for violations of the laws of the corporation."

The 3d section of the by-law of the 29th of October, 1836, under which the mayor refused to grant a license to the appellant to sell perfumery, is in these words, "It shall not be lawful for the mayor to grant a license, for any purpose whatever, to any free negro or mulatto, except licenses to drive carts, drays, hackney-carriages, or wagons."

The case was argued in the absence of *THRUSTON, J.*, by *Mr.*

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W. L. Brent and Mr. Dandridge for the appellant and *Mr. Bradley* for the appellees.

CRANCH, C. J., delivered the following opinion, (MORSELL, J., observing that he concurred only in that part of it which denied the power of the corporation to prohibit free colored persons from selling perfumery.)

This action is founded on the by-law of the 28th of October, 1831, entitled, "an act providing additional revenues for the corporation."

This by-law is very badly expressed; but we can understand the intention of the corporation to be, to raise a revenue by granting licenses to sell, or by imposing fines for selling, without license, the articles, for the sale of which licenses were to be granted.

But it is said that the defendant tendered the price or tax, for a license to sell perfumery, and demanded a license, from the mayor, which he refused to grant, because he was forbidden by the by-law of the 29th of October, 1836, § 3, to grant such a license to a colored person.

The defendant's counsel contend that this by-law is void, because the corporation had no power to forbid the mayor to grant the license; nor to discriminate between white and colored persons; nor to forbid any free colored person to carry on the trade of selling perfumery, which was a trade lawful to white persons.

The third section of the by-law of the 29th of October, 1836, says, "It shall not be lawful for the mayor to grant a license, for any purpose whatsoever, to any free negro or mulatto, except licenses to drive carts, drays, hackney-carriages, or wagons."

This clause, taken in connection with the act of the 28th of October, 1831, requiring a license, and imposing a penalty of from 10 to 50 dollars for selling without license, amounts, in effect, to a prohibition to free colored persons to carry on the business of selling any of the articles, for the sale of which a license is required by the by-law of the 28th of October, 1831.

The by-laws must not be repugnant to the general law of the land, further than such by-laws are justified by the express provisions of the charter.

By the general law of the land, free colored persons have a right to exercise any lawful trade or calling which white persons may exercise; a by-law forbidding them to do so, is contrary to the general law of the land, and void, unless authorized by the charter.

The selling of perfumery is a lawful business, or occupation. No express power is given to the corporation, by the charter, to

prohibit or restrain it, or to license it, or to require a license to use or pursue it. The exercise of it is not, in itself, a nuisance. The corporation has no authority, under the power "to lay and collect taxes" to require the person, exercising it, to obtain a license to do so; for the power, given by the charter, to lay and collect taxes, is only "to lay and collect taxes on real and personal property."

The licenses, which the corporation may require, are expressly designated; and are confined to "auctions, retailers, ordinaries and taverns, hackney-carriages, wagons, carts, and drays, pawn-brokers, venders of lottery tickets, money changers, hawkers and peddlers, and theatrical and other shows and amusements.

Their express power of restraining and prohibiting, is confined to tippling-houses, lotteries, and all kinds of gaming, and nightly and other disorderly meetings of slaves, free negroes, and mulattoes.

They have also an implied power to restrain or prohibit whatever may be inconsistent with such regulations as may be necessary to prevent the introduction of contagious diseases, and for the preservation of the health of the city; whatever may be a common nuisance; whatever may injure the navigation of the Potomac and Anacostia Rivers adjoining the city; and, in short, whatever may be inconsistent with the regulations which they have any express power to make.

But the right to sell perfumery is not real or personal property which can be taxed as such. It is not within the list of licenses authorized by the charter, nor is it one of the matters which may be restrained or prohibited by any express provision of the charter; nor can it injure the health of the city, or be in itself a nuisance.

I think, therefore, that it cannot be prohibited.

But it is said that colored persons are a distinct class, not entitled to equal rights with the white population, and that they may be prohibited, although the whites may not. Such is not the general law of the land in regard to a right of this kind; the right to get a living by an honest, lawful, and harmless occupation. The corporation cannot make it the law of this city, unless they are authorized to do so by the charter; and I cannot find, in the charter, any such authority. I think, therefore, that neither the Act of the 28th of October, 1831, nor the Act of the 29th of October, 1836, so far as they prohibit, or require a license for the selling of perfumery, is warranted by the charter.

But if the by-law of the 28th of October, 1831, should be justified or supported by the clause of the charter authorizing the corporation "to lay and collect taxes upon the real and personal property within the said city," so far as it requires a

license to be paid for, as a means of raising a revenue, yet a by-law to prohibit a certain class of citizens from exercising a lawful business or occupation, cannot be justified by the same clause of the charter; for the prohibition is not a means of raising a revenue.

The cases, in which licenses may be required under the charter, have been already enumerated, and are cases in which the public is concerned in the character of the person to be licensed; and therefore a discretion is given to the corporation to grant or refuse the license. The drivers of hackney-carriages, carts, and drays, are a kind of public servants, or common carriers, in whose honesty and fidelity the public is interested, as they have the carriage of property to a large amount, and must, in a great measure, be trusted; and they derive a credit and character from their license. In the other enumerated cases the necessity or expedience of giving a discretion to the corporation is sufficiently obvious. But the corporation has no power to prohibit or restrain the exercise of a common right, unless that power be expressly given, or be necessary to the exercise of some expressly given power.

But it has been suggested that the corporation derives its power, to tax a person who sells perfumery, from the clause of the charter which authorizes them "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages," &c.

The person who sells perfumery, it is said, is a "retailer," and therefore liable to be taxed and regulated, and to be prohibited from selling without a license.

The word, "retailers," in the charter, as I apprehend, means, exclusively, retailers of "wine, rum, brandy, whiskey, or other distilled spirituous liquor, strong beer, or cider."

These were the only retailers known in the Maryland statutes at the time of the separation of this part of the district from that State, to whom a license could be granted.

They were always, colloquially, and in various statutes, called "retailers," without designating them as retailers of liquors. The licenses were granted by the county courts, and after the separation they were granted by this Court, until 1804, when an amendment to the charter of Washington vested the power of granting them, within the city, exclusively to the corporation. The terms, "retailers," and "retail licenses," were as familiar here as they had been for many years in Maryland, and always applicable to retailers of liquors only.

By the Maryland Act of 1784, c. 24, it was enacted, "That no person shall retail any wine, rum, brandy, whiskey, or other

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distilled spirituous liquor, strong beer or cider, on the western shore, without a license for that purpose obtained; and any person selling any of the articles aforesaid, under the quantity of ten gallons, shall be deemed a retailer."

Here we have a clear statutory definition of the word, "retailer." It means a person selling wine, rum, brandy, whiskey, or other distilled spirituous liquor, under the quantity of ten gallons.

After having given this definition of the word, "retailer," the statute, and subsequent statutes of Maryland, use the word without the additional words, "of liquors," but always in the sense of the definition given in that statute. Thus in the 26th section of the same statute of 1784, it is enacted, "that if any retailer shall keep a disorderly house," &c., the court "may suppress such retailer." By the 27th section, "that every licensed retailer shall sell only by sealed measures;" "and it shall be lawful for any justice or constable, on complaint, to enter into the house of any retailer," &c. By the 30th section, "that any person not having before had a license to retail, may, at any other than the August court, have license granted," &c. By the 31st section, "that every person applying for a license to retail, shall, at the time of granting the same, enter into recognizance," &c.

By the Act of 1799, c. 80, § 4, the State's agent is authorized to superintend the collection of all moneys due for "forfeited recognizances, ordinary, retailers, and marriage, licenses."

By the Act of 1799, c. 85, § 2, it is enacted, "That the Mayor's Court of the corporation of Georgetown, shall have the sole and exclusive power of granting ordinary and retailers' licenses within the jurisdiction of the corporation."

Such being the exclusive use of the word, retailers, in Maryland, and in this county, Congress, in 1802, granted a charter to the city of Washington, in which, among other powers, they gave the corporation the power "to pass by-laws and ordinances, to provide for licensing and regulating auctions, retailers of liquors, hackney carriages, wagons, carts, and drays, and pawnbrokers within the city." This charter did not give the corporation power to license ordinary-keepers. In February, 1804, the corporation obtained an amendment of the charter, enlarging their powers, and, among others, giving them power "to license and regulate, exclusively, hackney-coaches, ordinary-keepers, retailers, and ferries."

Under this amended charter, the corporation passed a by-law on the 19th of July, 1804, entitled, "An act requiring annual licenses to be taken by ordinary or tavern keepers, retailers, and

hawkers and peddlers." By the 3d section of this by-law it is enacted, "That all retailers of wines or spirituous liquors, other than tavern-keepers, who shall sell the same in smaller quantities than ten gallons, shall take out an annual license therefor, and for which license they shall pay, for the use of the city, the sum of eight dollars, which license shall authorize the selling of any such quantity, not less than one pint; and provided the same is not drank in the house or store of the person having such license."

By the 4th section it is enacted, that every person, so obtaining a retail license, shall give bond, &c.

Here the corporation, in the title of the by-law, have used the word, "retailers," as it was used in their new charter, without the words, "of liquors," which were annexed to it in the charter of 1802; and in the body of the by-law they show what they mean by the word, "retailers," namely, those, other than tavern-keepers, who sell wines or spirituous liquors in smaller quantities than ten gallons, and not less than one pint; which is substantially the same definition as that given in the Maryland statute of 1784. And a license to do this the by-law calls "a retail license." The same by-law also authorizes a license for selling liquors in any house, other than a tavern, in smaller quantities than a pint. This is not, in the by-law, called retailing, nor the license a retail license; the word, retailing, having acquired a technical meaning under the Maryland statute which had appropriated it to the selling of liquors under ten gallons. This license to sell less than a pint was vulgarly called a license to sell by the small.

In the by-law of October 30, 1810, § 5, it is enacted, "that all licenses for hackney-carriages, theatrical, and other public amusements; to ordinary or tavern keepers, retailers, and hawkers, peddlers, and auctioneers, shall be paid for and issued, and the taxes on slaves of non-residents, and on dogs, shall be paid and entered as heretofore directed by the several acts respecting the said objects."

Here again the word, retailers, is applicable only to retailers of wines and other liquors; for no license had ever been granted to any other description of retailers. This was six years after the power given to the corporation to license and regulate "retailers." There is no expression in the by-law limiting it to retailers of liquors.

If the corporation had solicited the amendment of the charter, striking out the words, "of liquors," appended to the word retailers, in the first charter, in order that they might license and regulate retailers of all sorts of merchandise; or if they had

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supposed that the omission of those words, in the amended charter, had given them that power, it is not to be believed that they would have omitted to exercise it for a period of twenty-two years, namely, from 1804 to 1826, when, for the first time, on the 7th of November, they passed a by-law, by the first section of which the mayor is authorized "to issue licenses for the purposes following, on the terms and conditions hereinafter mentioned, to wit: Porter-cellar licenses, to keep a porter-cellar or house to sell in, or barter, porter, ale, strong beer, and cider, and to carry and deliver or sell the same in bottles in this city, on the payment of a tax for each license, at the rate of fifteen dollars per annum; and that any person or persons taking out a license for selling spirituous liquors in quantities not less than a pint, be permitted to sell porter, ale, beer, and cider, by paying annually for a license, in addition to the former license, five dollars, and to sell by wholesale or retail the following descriptions of goods, other than the manufacture of the United States; as dry goods, hardware, groceries, wines, liquors, medicines, perfumery, jewelry, and watches, a tax for each license at the rate of ten dollars per annum."

By the grammatical construction of this section, I should suppose that no license to sell dry goods, hardware, &c., by wholesale or retail, could be granted to any but a person taking out a license for selling spirituous liquors in quantities not less than a pint.

But it is probable that the person who drew the bill, intended to authorize separate licenses to be granted for the sale of each of the specified kinds of goods. If so, this was the first attempt to require license for the sale of any thing but liquors by a resident of the city. There had been a by-law passed on the 24th of May, 1823, requiring non-residents to obtain license to sell any goods, wares, or merchandise. It may be observed that the by-law of the 7th of November, 1826, imposes no penalty for selling the enumerated articles, or any of them, without license; but on the 12th of December, following, that defect was intended to be remedied by a by-law, enacting, "that if any retailer, or retailers of liquors, or sellers" (not retailers,) "of goods of foreign fabric, as described in the act to which this is a supplement, shall, after the 15th day of the present month of December, carry on the business of a retailer, or seller, as aforesaid, without license as aforesaid, he, she, or they, shall, on conviction of so retailing, or selling, after the said 15th of December, without such license or licenses, forfeit and pay for each day they may so sell, the sum of twenty dollars." Here it may also be observed that the words, "retailer," and "seller," are used in con-

tradistinction to each other. The word, "retailer," retains its original technical meaning, and is applicable only to retailers of liquors; and the word, "seller," to the seller of foreign fabrics. It is evident also that the by-law of November 7, 1826, so far as it requires a license to sell foreign fabrics, was not framed under the power given by the charter to the corporation, to license, tax, and regulate retailers, for it expressly includes those who should sell by wholesale; and the sellers of such fabrics are nowhere called retailers; nor could a power to license and tax retailers, in the most extensive sense of the word, authorize the corporation to license and tax wholesale dealers.

The by-law of the 28th of July, 1831, "to provide a revenue for the canal fund," declares that it shall be unlawful for any person to sell lumber, firewood, or coal, bricks, porter, ale, or beer, or to keep a livery-stable, or to traffic in slaves, within the limits of the corporation, without first obtaining a license therefor, on which certain taxes are imposed. No one can suppose that this by-law is justified by the power to license and tax retailers. No other by-law was passed upon this subject until that of October 28, 1831, which is the by-law upon which this prosecution is founded. It is an act, entitled, "An Act providing additional revenues for the corporation," and in the 1st section enacts, "That the taxes on certain licenses hereinafter named, shall be, and the same are hereby increased or fixed at the following rates per annum:

"For a license to keep a tavern," &c., "of forty rooms, one hundred dollars," &c.

"On each license to sell or barter all kinds and quantities of spirituous liquors, wines, cordials, strong beer, and cider, sixty dollars.

"On each license to retail spirituous liquors and wines, in quantities not less than a pint, and to sell groceries, hardware, dry goods, and china, glass, and crockery ware, twenty dollars.

"On each license to sell hardware, medicines, perfumery, jewelry, and watches, twenty dollars.

"For a license to keep a confectioner's shop, ten dollars.

"For a license to keep a confectioner's shop, with privilege to sell cordials, fermented and distilled liquors, sixty dollars.

"On each license to keep a porter-cellar, &c., twenty dollars.

"For a license to a non-resident to sell porter," &c., in the city, "fifty dollars.

"For a license to sell hats, boots, and shoes, not manufactured in the city of Washington, twenty-five dollars; and for a license to sell the same, or either of them, in addition to any other license, ten dollars."

And by the 3d section it is enacted, "that if any person or persons shall sell, barter, or keep, as in the first section of this act enumerated, without first obtaining a license therefor, he, she, or they, shall forfeit and pay, for each and every offence, a fine, of not less than ten nor more than fifty dollars, to be recovered and disposed of as are other fines for violations of the laws of this corporation."

This by-law, so far as it may seem to require a license to sell groceries, hardware, hats, boots, &c., does not appear to have been framed under the charter-power, to license, tax, and regulate "retailers;" for it uses the word, "retail," only once, and then only in reference to the sale of spirituous liquors and wines in quantities not less than a pint; and it requires a license to sell all these articles by wholesale.

From a consideration of the whole course of legislation upon this subject, from the year 1784, by the State of Maryland, by Congress, and by the corporation of Washington, up to the present time, it seems to me very clear, that the word, "retailer," as used in the laws of Maryland, in the charter of Washington, and in the by-laws of the corporation, means, exclusively, a retailer of liquors, and has been so understood universally.

But if it were not so, the defendant in this prosecution is not charged with retailing, nor with being a retailer of perfumery. He is simply charged with selling; and it does not appear that he did not sell by wholesale, in which case he cannot be punished under a power to punish retailers.

Upon these grounds, I am clearly of opinion, that the power, given by the charter, to license, tax, and regulate retailers, does not authorize the corporation to license, tax, and regulate the sellers of other articles of merchandise than wine, rum, brandy, whiskey, or other distilled spirituous liquors, strong beer, or cider, or other intoxicating liquors. That under the power "to lay and collect taxes upon the real and personal property within the city;" or the power "to lay taxes on particular wards, parts, or sections of the city, for their particular local improvements;" or the power "to establish and erect hospitals or pest-houses, watch, and work-houses, houses of correction, penitentiary, and other public buildings, and to lay and collect taxes for the expense thereof;" the corporation has no authority to require, from any person, a license to use any lawful and harmless trade, calling, or occupation.

Whenever the corporation is expressly authorized by the charter to grant a license, it has a discretion to withhold it; but it has no authority to restrain or prohibit any person from the full exercise of all his rights, under the general law of the land,

unless the power so to restrain or prohibit is expressly given by the charter, or necessarily results from some given express power. This is a rule applicable to all corporations acting under a charter; and to all bodies politic acting under a constitution. The powers not given are reserved.

Although free colored persons have not the same political rights which are enjoyed by free white persons, yet they have the same civil rights, except so far as they are abridged by the general law of the land. Among those civil rights, is the right to exercise any lawful and harmless trade, business, or occupation; and if it be not a trade, business, or occupation, subjected by the charter to the control or discretion of the corporation, I think they have no power to prohibit them from using it.

Judgment reversed, without costs.

See also *Hesketh v. Braddock*, 3 Burr. 1856.

JACOB RIDGWAY v. SAMUEL HAYS *et al.*

When a party is obliged to ask the aid of a court of equity to enforce his legal rights, the Court will compel him to do equity, and will only grant him relief to the extent of his equitable rights.

The consignee to whose possession the property has not come (it having been seized by a foreign government,) has no right in equity to detain the whole sum awarded as indemnity, under the French treaty of July 4, 1831, nor to enjoin, in the Treasury of the United States, more than his expenses and commissions.

The commissioners under the French treaty of 1831, had no power to decide ultimately, between two or more conflicting American claimants.

If the property seized belonged to a firm, one member of which was not a citizen of the United States, his share of the loss could not be allowed as a claim under that treaty; yet he would be entitled to receive, out of the sum awarded to the other members, what he had paid for freight, and for moneys advanced.

The decision of the commissioners is conclusive as to the question, whether the claim was valid against the French government, under the treaty, but not as to the question whether it was good against the indemnity awarded.

The commissions of the consignee are not chargeable to the French government under the treaty; they are a charge against the indemnity only; as they would have been against the proceeds, if the property had not been seized by the French government, and had been sold by the consignee.

The consignees had a right to make reclamations on the government of France, and were justly entitled to reasonable compensation for their trouble and expenses.

Where the United States are mere trustees of a fund for the benefit of individuals, it seems that it may be enjoined and stayed in the Treasury.

BILL IN EQUITY to restrain the defendants, Hays and others, from receiving, and the Secretary of the Treasury of the United States and the Treasurer, from paying to the defendants, the amount awarded to the assignees and representatives of Hays, under the French treaty of spoliations.

The bill states, in substance, that in 1806, and 1807, the plaintiff was a merchant in Antwerp, in partnership with

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Louis J. Mertens, since deceased, under the firm of J. Ridgway, Mertens & Co. That the plaintiff was a native citizen of the United States, then residing in Antwerp, as commercial agent of the United States. That in 1806, or 1807, the American vessels Bordeaux-packet, Helena, and Diamond, with cargoes belonging to American citizens, were consigned to the house of J. Ridgway, Mertens & Co., and arrived safe at Antwerp, and the invoices, bills of lading, and other documents duly came to their hands, as consignees, who accepted the trust, and became vested with all the rights of consignees. Shortly after their arrival the vessels and cargoes were seized and taken possession of by the civil and military authorities of France, then in possession of Antwerp; and after some time, the cargoes were landed and deposited in the public stores, and the consignees precluded from taking possession of them and from exercising any control over, or disposing of them for the benefit of the owners and shippers.

That the vessels were subsequently released, but the cargoes were retained by the French authorities, under sequestration until 1810, when they were sold, without any legal proceeding subjecting them to forfeiture or confiscation, under an order of the French emperor, and the proceeds deposited in the *caisse d'amortissement*, a branch of the French *fisc*. That the plaintiff, as consignee, incurred great labor and expense in endeavoring to get the property released, and never received any intimation from the owners and shippers that his conduct was ever disapproved by them, &c.

That the defendant, Hays, was owner of a valuable part of the Bordeaux-packet, which was insured by several private underwriters, who, or their agents, are made defendants. That the commissioners awarded sundry sums to the several parties interested, and, among others, "to the legal representatives or assigns of the said Samuel Hays," without designating them by name, "the sum of \$10,164⁹³/₁₀₀," and that the same will be paid to them out of the Treasury of the United States unless such payment be stopped and enjoined by this Court. That the plaintiff claimed, before the board of commissioners, and now claims in this Court, that he, as consignee, was and is entitled to receive the whole amount of the said indemnity, the property having vested in the consignees by the consignment, subject to account, to the persons interested therein; and exhibited before the board a statement of the amount of his claim against the said fund, for freight, charges, and commissions, exceeding 128,000 francs, applicable to the entire cargo of the Bordeaux-packet, the commissions being calculated upon the amount of sales at Antwerp, in 1810, exclusive of the particular balance of

general account against the said Hays properly chargeable against the said shipment. That although the whole of the said claim was not allowed as a distinct and substantive claim against France, a partial allowance was made to the plaintiff for the expenses of reclamation aforesaid, and in the awards, made as above stated, the board indicate them as including the amount legally claimable, if any such there be, by Jacob Ridgway, for freight paid, and moneys advanced by him on account of said cargo, other than the expenses of reclamation. That the right of Hays, and those claiming under him, is subject to the plaintiff's paramount right to the exclusive possession of the fund which stands in the place of the cargo, subject to account, &c. That the plaintiff's right of possession and lien were never divested or impaired; and he submits to the Court to decree to him such absolute, entire, and exclusive possession and control over the same as the legal owner thereof. And he further insists, that he is entitled to have and retain out of the property specifically, and out of the money so awarded, full payment of said balance of account, with interest, and all moneys expended in the reclamation, &c., with interest; and his commissions as consignee, they having been fully earned.

And that the plaintiff hoped that the defendants would have admitted him to receive the money so awarded, &c., but they claim to have the legal right to receive the same without recognition of the plaintiff's lien thereon, and without paying him what is legally and equitably due to him as aforesaid. All which is contrary to equity, &c. In tender consideration whereof, and that the plaintiff can only have relief in this Court "to regain possession of, and control over said property, of which he has been so wrongfully dispossessed, and which is now claimed by so many parties, so as to have the benefit and advantage of the lien, which, as consignee, he had and in equity is still entitled to have, and to reimburse himself, &c., he prays that he may, by the decree of this Court, be placed in the full and exclusive possession of said indemnity, so awarded as aforesaid, subject only to account, &c., and that the proceeds of the property, and the money payable under the awards, may be decreed to stand in the place of the property so shipped and consigned as aforesaid, and be subject to all liens, &c., as if the property had never been seized, or had been specifically restored, and that the plaintiff may be adjudged to be entitled to the full mercantile commission upon said property; and to full reimbursement of his expenses, disbursements, &c., of all which, if deemed necessary, he prays that an account may be taken, &c.; and that the defendants may be enjoined from demanding and

receiving the money, &c., and the Secretary of the Treasury and the Treasurer of the United States from paying, &c.

The answer of Samuel Hays admits the shipment of "certain goods" to the plaintiff, to be sold on a commission of $2\frac{1}{2}$ per cent., but denies that they ever came to the plaintiff's possession or were ever sold by him; but were seized and sold by the French; admits the awards, &c., and that the plaintiff incurred some inconsiderable trouble and expense, for which he has been twice compensated, once by the award of the commissioners, and once in settlement of accounts with this defendant. He denies that the plaintiff is entitled to any thing out of the award, &c.

Mr. Woodbury, Secretary of the Treasury, and Mr. Campbell, the Treasurer of the United States, say they are officers of the government of the United States, and not amenable to the jurisdiction of this Court as to payment of money out of the treasury of the United States, or any other of their official acts, and therefore plead and except to the jurisdiction of the court in this case. But, (under protest) admit the money to be in the treasury of the United States, and that it will "be duly paid to the parties to whom it shall appear that the moneys, so awarded, are legally and equitably due."

By the 1st section of the Act of Congress of the 13th of July, 1832, [4 Stat. at Large, 574,] "to carry into effect the convention between the United States and his majesty, the King of the French, concluded at Paris on the 4th of July, 1831," the president is authorized to appoint three commissioners, whose duty it shall be "to receive and examine all claims under the convention, according to the principles of justice and equity, and the law of nations."

And by the 6th section it is enacted, "that the said commissioners shall report to the Secretary of State a list of the several awards made by them, a certified copy of which shall be by him transmitted to the Secretary of the Treasury, who shall thereupon distribute, in ratable proportions, among the persons in whose favor the awards shall have been made, such moneys as may be received into the treasury," &c., "first deducting such sums of money as may be due to the United States from said persons in whose favor said awards shall be made, and shall cause certificates to be issued, showing the proportion to which each may be entitled of the amount that may thereafter be received; on presentation of which, at the treasury," &c., "such proportions thereof shall be paid to the legal holders of such certificates."

The list of awards is in Document No. 117 of the House of

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Rep., 24th Congress, 1st session, p. 16. And, among others, in the case of the Bordeaux Packet, there is an award

"To Jacob Ridgway, for expenses of reclamations made by him at Antwerp and Paris,	\$1,750.00
"To the following named claimants for cargo, (including herein the amounts legally claimable, if any such there be, by Jacob Ridgway, for freight paid and moneys advanced by him, on account of such cargo, other than expenses of reclamation,) namely,	
"The legal representatives or assigns of Samuel Hays,"	10,164.98
"James Henderson," and sundry other claimants of the cargo,	106,899.35

Whole amount awarded for Bordeaux Packet, \$118,814.33

The same kind of award was made in the cases of the Helena and Diamond; \$900 in the former, and \$1,950 in the latter, being awarded to Mr. Ridgway "for expenses of reclamation."

There were also several other cases in which awards were made in favor of "the legal representatives" of the original owner of the property, without naming them.

Mr. Key, for the defendants, moved to dissolve the injunction, and contended that the award of the commissioners for the plaintiff's expenses of reclamation was conclusive upon that subject, and that their rejection of his claim for commissions was also conclusive. His expenses have been twice paid, namely, in the award, and in the settlement of accounts between the plaintiff and the defendant, Hays, the defendant having given and paid his notes for the balance.

Mr. R. S. Coxe, contra. The board had no power to decide between contending claimants. *Sheppard et al. v. Taylor et al.*, 5 Peters, 685; *Comegyss v. Vasse*, 1 Peters, 193, 216. The consignee is the legal owner of the property; absolute, to the extent of his interest, even against the general owner. The sum awarded as indemnity stands in the place of the cargo, and subject to all its liabilities. 5 Peters, 710. The property was only sequestered, not confiscated; and sequestration does not alter the property. The consignees never lost their legal title, nor could they be deprived of it by any tortious act of the French authorities. *Griffith v. Ingledew*, 6 Sergeant & Rawle, 439.

The answer of Hays admits the whole foundation of the plaintiff's claim; and is only evidence in his favor so far as it is responsive to matters of fact within his own knowledge.

As to the right of this Court to enjoin the officers of the

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Treasury of the United States. The Court cannot control the executive as to any act, which, by the Constitution, is to be done by the executive; but the officers of government may be controlled as to acts not officially belonging to them. To decide the legal or equitable rights of contending claimants is properly a judicial, not an executive, authority. The duty of the Secretary of the Treasury, in this matter, is not official under the Constitution, nor discretionary; but he has a duty to perform under the treaty, and the act of Congress for carrying it into effect. By that treaty and the act, the United States are merely to receive and pay over the money to those who may be entitled to it. They are mere stakeholders. *Marbury v. Madison*, 1 Cranch, 169, 171.

Mr. Key, in reply. The plaintiff claims nothing but his commissions, and to them he has no right, because the property never came to his possession. Chitty, Equity, Dig. 1169. The consignees had no right to incur labor and expense in reclaiming the property. They were not bound to do any thing. The consignors were bound to look to the United States, who were bound to see that France made proper retribution.

This fund is not the proceeds of the cargo, but a compensation for the wrong done; and the bill claims these commissions jointly against all the shippers.

The plaintiff claims the whole indemnity; but in equity he is entitled only to what is due to him. A factor is, in equity, only a trustee for his principal, and can retain only what is due to him. *Burdett v. Willet*, 2 Vern. 638.

The commissioners were bound to decide the rights of conflicting claimants, because, by the 6th section of the act, the United States have reserved a right to retain any amount due to the United States by the persons in whose favor the award should be made.

As to the exemption of the officers of the treasury from the jurisdiction of this Court by way of injunction: Every case has been considered as depending on its own circumstances; and when the public interests would not suffer by it, the officers of the treasury have respected the injunction, but always under an express or implied protest.

In *Comegyss v. Vasse*, this Court decided that the officers of the treasury were not liable to suit merely because they held the money of the United States. And that this Court has not jurisdiction of the case because the fund has got into the Treasury of the United States. 1 Chitty, Equity, Dig. 725; 3 Merivale, 102.

CRANCH, C. J., after stating the case, delivered the opinion of the Court, as follows:

The object of this bill is to enforce, specifically, a lien upon the defendant Hays's proportion of the indemnity awarded by the commissioners for the French spoliation of the cargo of the ship *Bordeaux Packet*; and for that purpose, without stating the amount claimed by the plaintiff, as consignee, for commissions and charges on that cargo, it prays that the whole indemnity for the entire cargo may be paid to the plaintiff, so that he may, out of the same, pay himself, not only those commissions and charges, but the balance of his general account against the defendant Hays, (without stating the amount of that balance,) and distribute the residue to those who may be entitled thereto.

This prayer is founded upon the legal right which the plaintiff would have had to the possession of the cargo, and of the proceeds of sale, if the cargo had not been seized by the French government.

The plaintiff is not contented that this Court should give him equity, but he asks for strict law. He does not ask the Court to enjoin only the amount of his claims upon the cargo, or its representative — the indemnity awarded — but he now claims, in this Court, that he, as consignee, was and is entitled to receive the whole amount of the said indemnity, subject to account to the persons interested therein; that the rights of the shippers "are subject and subordinate to the paramount right and just claim" of the plaintiff "to the full, absolute, and exclusive possession of the same, subject to account with the" defendants, "and he submits to" the Court, "to decree to him such absolute, entire, and exclusive possession and control over the same, as legal owner thereof; and "he insists that he is entitled to have and retain out of the said property specifically, and out of the money so awarded as indemnity for the same, full payment of said balance of account, with interest up to the time of payment; and full remuneration and repayment to him of all moneys paid and expended by him, and his said late partner, in the reclamation, with interest, and his commissions, calculated upon the sales at Antwerp under the order of the French authorities."

And as the plaintiff can have relief only in this Court "to regain possession of, and the control over, said property, of which he has been so wrongfully dispossessed, so as to have the benefit of the lien which he had, and in equity is still entitled to have in and over the same, and to reimburse himself for the advances, expenses, &c., so as aforesaid made and incurred, he prays that the plaintiff may, by the decree of this Court, be placed in the full and exclusive possession of the said indemnity, so awarded, subject only to account as aforesaid; and that the proceeds of

the said property may be decreed to stand in the place of the property, and to be subject to all liens, claims, and rights, which did exist, or ought to have existed, in favor of the plaintiff against and upon the property, &c., and that the plaintiff may be decreed to be entitled to full mercantile commission, &c., and to full reimbursement of the expenses, payments, and advances so made and incurred as aforesaid, (of all which, if deemed necessary, he prays that an account may be taken under the direction of this Court,) and that the defendants may be enjoined, &c., and such further and other relief, &c.

The specific relief prayed is, 1st. A decree for the possession of the whole amount of indemnity awarded ; and, 2dly. A decree that the plaintiff may retain, out of that indemnity, the amount of the unascertained balance of the plaintiff's general account against the shippers ; moneys paid and advanced in the reclamation of the property ; and his commissions. No decree is asked against the defendants personally for the amount, if any, due by them to the plaintiff.

Under the prayer for general relief, the plaintiff can have no relief which is not warranted by the allegations of the bill.

There is no direct and positive averment in the bill, that any thing is due by the defendants, or any of them, to the plaintiff. It avers that services were rendered, and moneys expended, by the plaintiff, about the cargo, for the benefit of the shippers, but it is not averred that he has not been paid. The amount, or value of those services and expenses, is nowhere stated ; nor is the amount of the commissions. It may be \$100, or \$100,000.

If the plaintiff is not entitled to the exclusive possession of the whole fund, the whole ought not to be enjoined. If the whole should not be enjoined, we have no rule by which to say how much, if any, should be. When a party is obliged to ask the aid of a court of equity to enforce his legal rights, the Court will compel him to do equity ; and will only grant him relief to the extent of his equitable rights. The plaintiff's equity, in the present case, extends only to his claims for services and expenses. It is not necessary that he should have possession of more than that portion of the fund ; and before an injunction can be supported to that extent, the amount and value of those services and expenses must be ascertained, or at least stated upon oath by the plaintiff.

It is not necessary to the enjoyment, by the plaintiff, of all or any of his equitable rights, that he should have possession of the whole amount awarded ; and as the plaintiff has not, in his bill, stated the amount of his equitable claims on the fund, we think the injunction ought to be dissolved.

Ridgway v. Hays.

It is true, that an account is prayed by the plaintiff if it should be deemed necessary ; but the fund ought not to be enjoined in the mean time, unless some certain amount be stated and verified by affidavit ; and then the injunction, if granted, should only go to that extent.

The Court cannot say that an account is necessary unless some amount be claimed by the plaintiff and denied by the defendants. If the plaintiff will specify his claims, and the amount, the defendants may, perhaps, admit them ; and then an account, which is an expensive proceeding, will be unnecessary.

It has been contended that the decision of the board of commissioners, rejecting the claim of Mr. Ridgway, is conclusive against him.

To this there are two objections :

1. That the commissioners had no jurisdiction to decide ultimately between two or more conflicting American claimants.

The Act of Congress of July 13, 1832, [4 Stat. at Large, 574,] authorizing the appointment of the commissioners, declares their duty to be "to receive and examine all claims which may be presented to them under the convention, and which are provided for by the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." And to "report to the Secretary of State a list of the several awards made by them."

It appears, by the 1st article of the convention, that the claims which the commissioners were to examine and report upon, were "the reclamations preferred against" the French government "by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property."

The claims, of which the board had cognizance, were claims against the French government ; not against the owners of the property claimed, nor against the property itself.

In each case, the great question for them to decide was, whether the property of American citizens had been unlawfully seized, &c., by the French government. So far as it was necessary to decide the national character of the property seized, they had authority to ascertain the legal owner ; but if all the conflicting claimants were citizens of the United States, there was no necessity of their deciding the question of ownership between them. They might select the name of the person who seemed to them to be the legal owner, or they might name all the conflicting claimants, and leave them to litigate their rights in the municipal courts of the country ; or they might award in favor of "the legal owners," without naming them, as they did in

several cases, as will appear by reference to the list of awards returned by them to the Secretary of State. (See printed documents of the House of Representatives, No. 117 of the 1st session of the 24th Congress.)

In accordance with this opinion is that of the commissioners under the Florida treaty, in *Sheppard et al. v. Taylor et al.* 5 Peters, 685; and of the Supreme Court of the United States, in *Comegyss v. Vasse*, 1 Peters, 212. In that case, the commissioners under the Florida treaty had awarded a sum of money to Comegyss and others, assignees of Vasse under the bankrupt law. Vasse brought his suit at law against his assignees to recover that amount, upon the ground that his right of indemnity from Spain did not pass by the assignment.

Mr. Justice Story, in delivering the opinion of the Court, says, (in p. 212,) "It has been justly remarked in the opinion of the learned judge who decided this cause in the Circuit Court, that it does not appear, from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit the award was made. We do not think that the fact is material upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid; if they ascertain the amount, their award in the premises is not reëxaminable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount, once fixed, is a final ascertainment of the damages or injury.

"This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights, of different citizens, to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bonâ fide* purchasers, was not necessary to be ascertained, in

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order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broad jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances it cannot be presumed, that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. We are, therefore, of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners."

The powers of those commissioners were "to receive, examine, and decide upon, the amount and validity of the claims against Spain." The powers of the commissioners in the present case, are "to receive and examine," and to "report to the Secretary of State a list of the several awards made by them." The reasoning of the judge in that case applies, therefore, with greater force to this.

2. The claim of Mr. Ridgway, as consignee and owner, was in the right of the firm of J. Ridgway, Mertens, & Co., and it is admitted in argument that Mertens was not a citizen of the United States. His share of the loss, therefore, was not a claim of which the commissioners had cognizance. But although they rejected his claim as legal owner of the whole cargo by virtue of the consignment, they did not reject his claim for freight paid, and moneys advanced, as against the sum awarded; but they did not consider him as having a direct claim against the French government therefor. Their decision, so far as it was a claim against that government, is conclusive; but not as to his claim against the sum awarded.

His claim against the French government for commissions, was also rejected; it being one of a rejected class of claims; for if indemnity be made to the shippers, the commissions, if due at all, are a charge upon the indemnity, in the same manner as they would have been upon the proceeds of sale, if there had been no seizure. But this rejection is no bar to the plaintiff's

claim on the fund, for commissions, if he is entitled to them. He was, and perhaps is, entitled to a just and equitable remuneration for his services and expenses; the commissions may or may not be the proper measure of that remuneration. Whether the sum allowed him by the commissioners for expenses of reclamation, and the amount charged in his account and settled by Mr. Hays in May, 1811, are a full compensation, does not appear, and the Court has no means of deciding that question.

It is said that the consignees had no right to make the reclamation and incur the expenses, &c., but that the shippers ought to have applied, at once, to the United States. But if they had, the answer would probably have been, "Go and complain to France; we cannot suppose that she will not do you justice. After using in vain all reasonable endeavors to obtain indemnity from her, come to us, and we will make a national affair of it." The consignees, as agents of the shippers did so, and they are, or were, justly entitled to reasonable compensation for their trouble and expenses.

An objection was taken to the number of the defendants. But the plaintiff's claim is for expenses, &c., applicable to the whole cargo, and it was necessary to make defendants of all who were interested in the apportionment of those expenses.

It has also been objected, that all the defendants have not answered it. But they are absent; and no process has been served upon them, nor has any notice been given by publication, as is usual in such cases. The principal defendant, the original owner and shipper of the cargo, has answered, and the other defendants claim under him, and, according to the nature of the case, he must be supposed to have the best knowledge of its circumstances; and he avers that the plaintiff has been twice paid for his trouble and expenses; and denies that he is entitled to any thing out of the award. If the plaintiff had stated his case fully, I do not know that this answer would have been sufficient to dissolve the injunction; but, upon the bill itself, I think the injunction must be dissolved.

If the Court should be of that opinion, it will be unnecessary to decide as to the authority of the Court to enjoin the payment of money out of the treasury of the United States.

It may be observed, however, that in the present case, the fund is placed in the treasury of the United States as in a place of deposit only, and the United States are merely trustees; and if the award of the commissioners is not conclusive between conflicting American claimants of the fund, and if the ordinary judicial tribunals of the country have jurisdiction to decide such conflicting claims, I cannot see why the United States, in cases

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in which they are merely stakeholders, should not submit to those decisions, and aid those tribunals in the due administration of justice.¹

The plaintiff having had leave to amend his bill, the motion to dissolve the injunction came on again to be argued upon the amended bill and answer, and was further postponed to the 2d of February, when the Court, (THRUSTON, J., absent,) dissolved the injunction, except as to the amount claimed by Mr. Ridgway.

 UNITED STATES v. NEGRO MOSES SMALLWOOD.

WITNESS. Indictment for assault and battery upon his wife. The wife was admitted to testify for the United States, on the authority of the case, *United States v. Filton*, at November term, 1835. (4 Cranch, C. C.)

 UNITED STATES v. NEGRO PRISCILLA WEST.

Evidence that a colored person has resided in the county and city of Washington for a year and more, going at large as a free person, and claiming to be free, in the absence of all contradictory evidence, except color, is sufficient to rebut the presumption of slavery, arising from color.

A COLORED WOMAN was offered as a witness for the United States.

Mr. W. L. Brent, for the defendant, objected that *primâ facie* she was a slave.

Mr. Eckloff testified that she had lived in his family as a free woman; that he had known her about twelve months; and that she was generally reputed to be, and passed as a free woman.

Mr. D. Waters, a constable, testified that he had known her about a year, and that she was generally reputed to be a free woman. That she had acted openly as such, and everybody believed her to be free.

The COURT (*nem. con.*) said this evidence was sufficient to rebut the presumption arising from color, and to throw the burden of proof on the defendant.

¹ See *Ellis v. Lord Gray*, in *Equity*, 6 Simons, 214, where the Lords Commissioners of the Treasury were enjoined from paying an annuity.

WILLIAM HAYMAN, a Creditor of Samuel Moxley, v. SAMUEL MOXLEY, an Insolvent Debtor.

Upon allegations filed in court, within two years after the application of an insolvent debtor for the benefit of the act for the relief of insolvent debtors within the District of Columbia, if the defendant do not appear to answer the same, after being duly summoned, the Court will proceed to take evidence *ex parte* in support of the allegations, and, if they find them to be true, will direct that the order of discharge, before made by a judge of court, be rescinded, and that the defendant be precluded from the benefit of the act.

SAMUEL MOXLEY, on the 15th of November, 1831, made application to the chief judge of this Court, to be discharged under the act for the relief of insolvent debtors within the District of Columbia, and was discharged on the 21st of the same month.

Within two years after his said application, William Hayman, a creditor of Moxley, filed in this Court allegations charging that Moxley had, within twelve months next preceding his said application, conveyed certain property to one Samuel Chew to secure a debt due to one Peter Ritter by the said Moxley, with intent to give Ritter a preference, contrary to the 7th section of the act.

Notice of the said allegations was duly given to Moxley, and he was duly summoned to answer the same on the 4th Monday of March, 1834, which he failed to do; whereupon, the Court, on the 7th of December, 1836, proceeded to receive evidence *ex parte* in support of the allegations, and finding them to be true, they made the following order:

“Whereas the said Samuel Moxley heretofore, to wit, on the 15th day of November, 1831, filed his petition before the chief judge of the said Circuit Court to be discharged from imprisonment under the provisions of the act for the relief of insolvent debtors within the District of Columbia, and having taken the oath by the said law prescribed to be taken, by insolvent debtors, before the said chief judge, and complied with the other provisions of the said act, was, by the order of the said chief judge, dated the 21st day of November aforesaid, discharged from imprisonment agreeably to the provisions of the said act; and whereas William Hayman, a creditor of the said Samuel Moxley, heretofore, to wit, on the 26th day of March, in the year 1832, and within two years next after the filing of the petition of the said Samuel Moxley aforesaid, did file certain allegations in the said Circuit Court against said Samuel Moxley, now of record in the said Court, and the said Samuel Moxley having been duly summoned to answer to the said allegations, a copy of which

United States v. Prior.

was left with him, and he having failed to appear according to the said summons, and the Court having proceeded to examine the truth of the said allegations, and being satisfied by evidence in the said cause, that the said Samuel Moxley had, within one year next before the filing of the petition of the said Samuel Moxley aforesaid, to wit, on the 23d day of August, in the year 1831, by his deed of that date, conveyed certain real and personal estate, in the said deed specified, the property of him the said Samuel Moxley, to one Samuel Chew, his heirs and assigns, with intent to give a preference to one Peter Ritter, a creditor of the said Samuel Moxley, in the payment of a debt due from the said Moxley to the said Ritter, as more fully appears by the said deed, a certified copy whereof is filed as of record in this cause. It is, this seventh day of December, in the year 1836, ordered by the COURT, that the order, made by the chief judge of this Court on the 21st day of November, in the year 1831, for the discharge of the said Samuel Moxley from imprisonment as an insolvent debtor agreeably to the Act of Congress, entitled, 'An Act for the Relief of Insolvent Debtors within the District of Columbia,' be, and the same is hereby rescinded. And that the said Samuel Moxley be, and he is hereby precluded from the benefit of the Act of Congress, entitled, 'An Act for the Relief of Insolvent Debtors within the District of Columbia.'"

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UNITED STATES v. NEGRO RALPH PRIOR.

A count for stealing, and a count for receiving stolen goods, may be contained in the same indictment, and the attorney for the United States will not be put to his election upon which to proceed.

The whole confession must be given in evidence, if any part is given, but the jury has a right to judge for themselves of the truth thereof or of any part of it.

INDICTMENT. The first count was for stealing the goods of one Eckloff. The second count was for receiving them, knowing them to be stolen.

Messrs. Brent & Brent, for the defendant, contended that the Court ought to oblige the attorney for the United States to elect the count upon which he would proceed; and they cited Russell on Crimes.

The COURT, (MORSELL, J., absent,) refused.

Mr. R. J. Brent contended that the confession of the defendant must be taken altogether; and that if there is no evidence to contradict any part of the confession, the attorney for the United States cannot be permitted to argue to the jury that any part of the confession is false.

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CRANCH, C. J., said, that the question has often been made in this Court ; and the Court had always decided, that the whole confession must be given in evidence to the jury ; but that they had a right to judge for themselves of the truth of it, or of any part of it. (See Starkie, part 4, p. 48.)

Verdict, not guilty.

UNITED STATES v. JOHN ROBERTSON.

It is not larceny in A to receive goods under a false pretence that the owner had sent him for them, although A appropriated them to his own use.

THE defendant went to B, who had sold a parcel of cigars to C, and pretended that C had sent for a box of them ; upon which B delivered a box to the defendant, who sold it, and gave a false account of the manner in which he had obtained it.

THE COURT, (*nem. con.*) was of opinion that it was not larceny. See Chitty, 907 ; 2 Russell, 118 ; and Roscoe, 493.

UNITED STATES v. NEGRO ALEXANDER VINSENT.

A certificate of freedom is not such a "pass" as is contemplated by the 19th section of the Maryland Act of 1796, c. 67.

INDICTMENT for giving a pass to one of Mr. Custiss's slaves, "being a paper writing, purporting to be a certificate from the President of the Board of Aldermen, and acting Mayor of the city of New York, under seal of the Mayoralty of said city of New York, that the bearer thereof, Alexander Vinsent, was a free person."

THE COURT, (*nem. con.*) was of opinion that the paper was not such a "pass" as is contemplated by the 19th section of the Maryland statute, upon which the indictment was founded.

UNITED STATES v. RICHARD H. WHITE.

The Court will not quash an indictment because it appears upon the record that the indictment was not found within two years after the offence committed, for that would deprive the United States of the right to reply that the defendant was a person fleeing from justice ; or to show it in evidence on the trial. The defendant may avail himself of the limitation either by special plea or by evidence upon the general issue.

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The Court, at the suggestion of either party, will order some of the witnesses to be taken out of Court, and kept by the marshal, while other witnesses are under examination; but will not order them to be kept apart from each other.

When a witness is objected to on the ground of his disbelief of a God, and of a future state of rewards and punishments, he is not to be examined on oath respecting his religious sentiments; but will be permitted to explain them; and if he then declares that he believes in a future state of existence, and of a Supreme Being who will punish him, either in this world or the next, for his evil deeds; and if it appears in evidence that he has so declared, before the trial; and that he sent his children to the Sunday-school, and his wife and children regularly to church, the Court will permit him to be examined as a witness, leaving his credibility to the jury.

The Court will not permit the declarations of another defendant, charged with the same offence in a separate indictment, to be given in evidence against this defendant, such declarations having been made after the supposed accomplishment of the common purpose.

If a witness be cross-examined upon a collateral matter, evidence will not be admitted to disprove that matter, in order to discredit the witness.

The only question as to the character of a witness, proper to be asked, is, "Are you acquainted with the general reputation of the witness as to veracity? And from your knowledge of that general reputation, would you believe him upon his oath?"

Evidence of the general bad character of the witness will not be permitted to be given to impeach his credibility.

A person may flee from justice although no process was issued against him.

The statute of limitations runs in favor of the offender, although it was not known to the United States or any of their officers of justice, that he was the person who committed the offence.

The departure of the offender from the vicinity of the place wherein the offence was committed, to his usual residence in another part of the United States, for the purpose of avoiding punishment for that, or any other offence, is a fleeing from justice, and the statute of limitations is no bar to the prosecution, unless, within two years, he returned to the place wherein the offence was committed, and his return was so open and public, and under such circumstances, that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him, and that two years and more have elapsed since that period to the time of finding the indictment.

Quære?

According to the practice of this Court, when a new trial is granted, the cause is not to be tried again at the same term, unless by consent of parties and leave of the Court; but this rule does not apply to cases where the jury has been discharged because they could not agree upon a verdict.

If the defendant was not present, nor aiding or abetting at the act, although he was concerned in the design to commit the offence, he is only liable as accessory before the fact.

A verdict finding the defendant "not guilty, upon the plea of limitations, more than two years having elapsed from the committing of the offence to the finding of the indictment," is argumentative, and therefore bad.

THIS was an indictment against Richard H. White for burning the treasury buildings of the United States.

The indictment contained three counts. The first charged that the defendant, at, &c., on the 30th of March, 1833, with force and arms, "a certain public building, called the Treasury Office of the United States, situate in the city of Washington, in the county and district aforesaid, one of the cities of the District of Columbia, being one of the public buildings in the said city of said district, belonging to the United States, did maliciously and wilfully burn; against the form of the statute," &c.

The second count charged, that the defendant, on the day and

year aforesaid, at, &c., with force and arms, "on the night of the said day, a certain house called the Treasury Office of the United States, in which certain persons, the clerks and watchmen in the employment of the United States, did reside and lodge, belonging to the United States, situate in the said county and district, feloniously, wilfully, and maliciously, did set fire to, and burn and consume, against the peace and government of the United States."

The third count charged, that the defendant, on the day and year aforesaid, at, &c., with force and arms, "on the site of a certain needful building belonging to the United States, being the Treasury Office of the United States, the site whereof was ceded to the United States, and under their jurisdiction, being in the county and district aforesaid, a certain dwelling-house, wilfully and maliciously did burn, against the form of the statute," &c.

The indictment was not found until the 30th of March, 1836. The first count was upon the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 448,] "for the punishment of crimes in the District of Columbia," the first section of which enacts that every person who shall be convicted, in any court in the District of Columbia, of any of the offences therein named, one of which is "arson," shall be sentenced to suffer imprisonment and labor, for the time and times thereafter prescribed in the penitentiary of the District of Columbia. And by the third section it is enacted, that every person duly convicted of the crime "of maliciously, wilfully, or fraudulently burning any dwelling-house," "or of maliciously and wilfully burning any of the public buildings in the cities, towns, or counties of the District of Columbia, belonging to the United States," "shall be sentenced to suffer imprisonment and labor, for a period of not less than one nor more than ten years, for the first offence."

The second count was at common law. The third count was upon the first section of the Act of Congress of March 3, 1825, c. 67. [4 Stat. at Large, 115.]

Mr. W. L. Brent, for the defendant, moved the Court to quash the indictment, because it appeared upon the record that more than two years had elapsed between the committing of the offence and the finding of the indictment. And by the Act of Congress of the 30th of April, 1790, [1 Stat. at Large, 112,] "for the punishment of certain crimes against the United States," it is enacted "that no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next

after the treason, or capital offence aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: Provided, that nothing herein contained shall extend to any person or persons fleeing from justice."

The COURT (*nem. con.*) refused to quash the indictment; because, until the facts shall appear upon the trial, it cannot appear that the defendant was not a person fleeing from justice, and therefore not entitled to the benefit of the limitation of time; and if he is entitled to its benefit he may have it upon plea, or upon evidence under the general issue.

Mr. Brent then moved that sundry witnesses on the part of the United States should be taken out of court, and kept separate from each other during the examination of the others.

The COURT (*nem. con.*) ordered the marshal to keep them out of court, but refused to order them to be kept separate from each other.

Mr. Brent then objected to one William Hicks, as a witness, upon the ground that he does not believe in the existence of a God, and a future state of rewards and punishments, and cited Roscoe on Evidence, 96, 97, (Amer. Ed.) to show that the witness cannot himself be examined as to his belief.

Mr. Key, Attorney for the United States, cited Starkie on Evidence, part 2, p. 123, and Roscoe, 97, 98.

Mrs. Harker was then called by the defendant's counsel, and testified that some years ago she had several conversations with Hicks, at her boarding-house in New York, in which he said he did not believe in the existence of a God, nor of a future state of punishment.

The COURT, (*nem. con.*) permitted Hicks to state what his opinions were. He then stated that he always had believed in the existence of a Supreme Being, and that he will punish him, in this world or the next, for his evil deeds; that he does now believe in a future state of existence; that he sends his children regularly to the Sunday-school, and his wife and children to church. Upon being asked whether he had disclosed these sentiments to any of the witnesses, he said that he did not know that he had.

Mr. Merritt, a police officer of New York, testified, that having heard that Hicks's testimony would be objected to on account of his religious opinions, without disclosing his object to Hicks,

he asked him his opinion, when Hicks stated that he believed in the existence of a God, and a future state of punishment.

The COURT permitted him to be sworn.

Mr. J. R. Key, for the United States, offered in evidence against the defendant, Richard H. White, the admissions of Henry H. White, who stands charged with the same offence, in a separate indictment, evidence having been offered tending to prove that both were in the city of Washington the day preceding the burning of the Treasury building, that both went away together in the evening, and that the defendant had told Henry to say nothing of burning the Treasury.

Mr. Key cited Starkie on Evidence, part 4, p. 1302.

Mr. Brent, for the defendant, denied that the doctrine of Starkie applied to declarations made after the thing was done, but only to declarations made in prosecution of the common purpose, *in fieri*, as part of the *res gestæ*. Roscoe, 306 ; Starkie, part 2, p. 46, 47, 48.

The COURT, (THRUSTON, J., *contrà*.) refused to permit the declarations of Henry H. White, made after the supposed accomplishment of the common purpose, to be given in evidence against Richard (the defendant,) in this trial, they having been indicted separately, and not charged with a conspiracy.

The witness, Fisk, having, upon cross-examination by *Mr. Brent*, denied that upon the trial of one Drew in Pennsylvania, he had sworn that he did not know Finch, *Mr. Brent* now called a witness (Mr. Blaney,) to prove that Fisk did so testify on that trial, in order to discredit him by this contradiction or falsehood.

Mr. J. R. Key, for the United States, objected that the cross-examination was upon a collateral matter, and that it is not competent for the party thus cross-examining a witness, to bring other witnesses to contradict him on such collateral matter. Starkie, part 2, p. 134, 138, 140, 141, 144, 145 ; 1 Chitty, Cr. L. 622 ; *Harris v. Tibbet*, 2 Campbell, 637.

Mr. Brent, *contrà*, cited Starkie, part 2, p. 145.

The COURT, (THRUSTON, J., absent,) refused to permit the defendant's counsel to bring evidence to prove that Fisk perjured himself on the trial of Drew by swearing that he did not know Finch ; and to contradict his assertion, upon cross-examination in this cause, that he did not at that time know him ; it being a collateral matter brought out by the cross-examination.

The Court also said that the only question as to the character of the witness, proper to be asked, is, "Are you acquainted with the general reputation of the witness as to veracity ; and from your knowledge of that general reputation would you believe him upon his oath ?"

The Court refused to permit evidence to be given of the general bad character of the witness.

Mr. R. J. Brent, for the defendant, prayed the Court to instruct the jury "that there is no evidence before the jury that the defendant fled from justice; or that if the Court should be of opinion that there is some evidence of that fact, then to charge the jury that if they should be of opinion from the evidence that the defendant did not flee from the United States, or conceal himself to avoid process, he is entitled to the benefit of the limitation of the statute."

The defendant's counsel contended that "fleeing from justice" meant fleeing from process. That no person can be said to flee from justice until process has been issued against him; and that such is the meaning of the Constitution of the United States, Art. 4, § 2, and of the Act of Congress of the 12th of February, 1793, [1 Stat. at Large, 302,] and of the Act of March 3, 1801, § 6. [2 Ib. 115.] He might have been arrested as well in one district of the United States as another; so that mere removal from one district to another cannot be called fleeing from justice, unless it be done with intent to evade process. Act of Congress, 24th Sept. 1789, § 33. [1 Ib. 91.] Besides, he appeared openly and publicly in this city in March, 1834. *Fowler v. Hunt*, 10 Johns. 464.

It is not necessary that the United States should have known that the defendant committed the offence, to entitle him to the benefit of the limitation.

Mr. Key, contra, contended that the defendant could not avail himself of the limitation unless the United States knew that he had committed the offence, or had the means of knowing it, as in *Watkins's case*, where the means of knowing the fraud were in the treasury department.

If the defendant once fled from justice he is forever barred of the benefit of the statute. *Hysinger v. Battgells*, 3 Gill & Johns. 158.

Mr. Brent, in reply, contended, that although he might have fled at first, if he afterwards returned and appeared so publicly in Washington that he might have been arrested, the statute began to run in his favor from the time of such return. *Faw v. Roberdeau*, 3 Cranch, 176.

The Court refused to give the instruction as prayed, but instructed them that if they "believe from the evidence that the departure, from this district, by the traverser, on the evening of the 30th of March, 1833, or at any time afterwards within two years thereafter, was for the purpose or with the view to avoid punishment for the offence of burning the Treasury building, or

for any other offence, this was fleeing from justice, and the statute of limitations is no bar ; unless the jury should also believe the said prisoner afterwards returned to the county of Washington, and that his return was so open and public, and under such circumstances, that opportunity was afforded by the use of ordinary diligence and due means, to have arrested him ; and that two years and more have elapsed from that period to the time of finding of the indictment in this case."

THRUSTON, J., dissented ; and his reasons were understood to be, that if the defendant once fled from justice, no subsequent return would enable him to avail himself of the limitation ; and that he could in no event avail himself of the limitation unless the United States knew that he had committed the offence. He was also understood to be of opinion, that there was not sufficient evidence of the defendant's return, &c., to justify an instruction upon that point.

CRANCH, C. J., said that if the defendant (as his counsel had intimated,) was willing to agree to the instruction, he should not object to it ; but he was not entirely satisfied with it. He said there were two modes of fleeing from justice, namely, departing from the jurisdiction of the offended government, and concealing himself within it. The removing from one place to another in the same jurisdiction, unless clandestinely, or with intent to escape from justice, would not be a fleeing from justice ; nor would his return to Washington be necessary to enable him to avail himself of the limitation, if he had not concealed himself, but appeared openly in New York, his usual place of residence. The offence was against the government of the United States, and the offender was as liable for arrest in New York as in Washington. However, as the defendant's counsel had agreed to the instruction as it was drawn up, he should not object to it. He observed also, that he did not think it necessary that the United States should have known that the defendant had committed the offence, in order to his availing himself of the bar, by limitation of time.

Mr. Brent, for the defendant, then prayed the Court to instruct the jury, "that if they believe, from the evidence, that the traverser was not personally present at the time of applying the fire to the Treasury building, or not sufficiently near, at the time, to be aiding and abetting in the applying of the fire, although the jury should believe that he was concerned in the design of burning said building, then the traverser is but an accessory before the fact, and is entitled to be acquitted under the present indictment."

This instruction did not seem to be opposed by the Attorney

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for the United States; who said that he should contend that if the defendant was near enough to aid the person who applied the fire, by keeping others off, or by facilitating his escape, &c., he would be considered as a principal. To this suggestion the counsel for the defendant assented, and the Court gave the instruction as prayed.

THRUSTON, J., dissented, and his reason was understood to be, that there was no evidence that the defendant was not present at the burning.

The jury retired on Saturday, 24th December, at 3 o'clock, P. M., and were kept in their room until Tuesday the 27th, at 2 o'clock, P. M., when they were discharged by consent of the parties, as they could not agree.

On the 6th of January, *Mr. Brent*, for the defendant, moved the Court to continue the cause to the next term, upon the defendant's affidavit that Willard Carpenter, of Troy, would testify that the general character of Mrs. Baldwin, and of William Hicks, is such that they cannot be believed on oath, and that he has used due diligence, &c.

Mr. Key, for the United States, admitted that Mr. Carpenter would testify as stated in the affidavit.

As this cause stood upon the docket before that of Henry H. White, the Court ordered it to be first tried, although Henry requested to be tried first, and offered himself ready, but refused to be tried with Richard.

Mr. Brent, for the defendant, Henry H. White, contended that according to the practice of this Court, a cause, once tried, cannot be tried again at the same term, unless by consent; and must be put at the end of the docket.

CRANCH, C. J., said that that rule was applicable only to causes which had been tried, and a verdict found, and a new trial granted. This cause cannot be said to have been tried until a verdict shall have been found. The jury was discharged by consent because they could not agree; so that no verdict has yet been found in this cause.

The cause came on again for trial on the 6th of January, 1837.

The objection was again taken to the admission of William Hicks as a witness; but as THRUSTON, J., was absent, and CRANCH, C. J., was in favor of admitting the witness, it did not prevail, and the witness (Hicks,) was sworn and examined.

Mr. Key, for the United States, offered to read Hicks's affidavit, made as a foundation for the arrest of the defendant, in corroboration of Hicks's testimony, which had been impeached by showing that he had made contradictory statements; and to show that there was no combination with Mrs. Baldwin, one of the witnesses for the United States.

Mr. Brent, contra, cited 1 Starkie, 148, and 3 Starkie, part 4, p. 1758.

The COURT, (THRUSTON, J., *contra*, or doubting,) rejected the affidavit.

The COURT, (THRUSTON, J., *contra*,) again gave the instruction respecting the defendant's being an accessory only, unless present, aiding, and abetting, &c.

The COURT also gave the same instruction to the jury which they had before given respecting the limitation of time, and the fleeing from justice.

THRUSTON, J., *contra*, delivered the following opinion :

The question presented for the consideration of the Court is on the following prayer [omitted]. My opinion, at the former trial of the traverser, was different from that of a majority of the Court; having assented only to the first branch of the instruction prayed, and dissented most explicitly from the last; that is to say, I was of opinion that if the jury should believe, from the evidence, that the traverser was guilty of having burnt the Treasury building and fled from justice, that his return within this district afterwards (in the manner, and under the circumstances proved by the witnesses,) conferred no right on him to claim the benefit of the limitation provided in the latter part of the 31st section of the Act of Congress, entitled, "An Act for the punishment of certain crimes against the United States." I was of opinion, and still am, that this benign indulgence in favor of the accused, of exemption from prosecution after a lapse of two years from the commission of the offence to the time of finding a presentment or indictment against him, admitted of no latitude or extension of construction in favor of the accused, from any supposed analogy between criminal and civil prosecutions. That if, in civil cases, a return into the State, or jurisdiction of the court, or into the place where the cause of action accrued, of the debtor or party liable to the action, after having absented himself therefrom, rendered it incumbent on the party having the cause of action against him, to bring his suit within the period provided by law after such return, or be liable to be barred by the act of limitation; that this was so ordained by positive enactment of law, namely, Laws of Maryland, 1765, c. 12, § 8, or even without any positive statutory enactment, the Court should have given this free construction to the law of limitation in civil cases, yet that it could not warrant any such construction of the clause of limitation in the aforesaid act of Congress. In civil cases a cause of action cannot exist, or at least it is difficult to conceive a case where the person liable to the action is unknown to the

plaintiff. If it be a matter of contract, he must be known to the plaintiff; if of *tort*, he must be almost equally so. In all cases, however, I hold it clear that the return must be such as to afford the plaintiff or creditor reasonable means of arresting the defendant, otherwise *laches* may be imputed, and he shall not be excused if he do not avail himself of such occasion to pursue the party liable to him. I should hold, even in a civil case, that a bare passage through the country, or county, or place where he ought to be arrested, unless such transit be known to the creditor, or party having cause of action against him, and the means of arresting him be given, would afford no just grounds to limit the right of action. And the words of the Maryland statute clearly bear me out, I think, in this position. See the Act of 1716, c. 23, § 4, which provides, "that no person absenting himself out of this province, or that shall remove from county to county, after any debt contracted, whereby the creditor may be of uncertainty of finding out such person, shall have any benefit by this limitation in this act specified." Now is it not clear that the reason such wandering debtor shall have no benefit of the limitation is, that the creditor is uncertain where to find him: how uncertain? Because he may not actually know where he is — where to find him. If, then, the debtor returns into the country or place where his creditor should arrest him, and such return be unknown to the creditor, or if the return be not so public, and the stay of the debtor in the place not so long as that the creditor by ordinary diligence might have arrested him, there is the same uncertainty, and in such case the statute of limitation shall not bar him. It is true the Act of 1765, c. 12, § 3, says that the party having cause of action shall commence the same "after the presence, in this province," of the person liable thereto, within the time limited by the act aforesaid, of 1715; but surely such presence must be known to the party having cause of action, or should be so public, and of such duration as that by reasonable diligence the party having cause of action might know of such presence, or the uncertainty on his part is just as great as if the party liable were absent from the State, or jurisdiction of the Court. If these views be correct, let us examine then what this uncertainty in civil cases is on the part of the creditor, which the statute speaks of, which protects him against the plea of limitation. It can be only, as in the words of the statute, the uncertainty where to find his debtor. Whenever this uncertainty exists, no matter whether the debtor returns into the place where the creditor may arrest him, or keeps away, as it is the same thing, unless he be there long enough and openly enough, that the creditor, by reasonable

vigilance, might arrest him ; in such case the uncertainty no longer exists. The words of the act are, "whereby the creditor may be at uncertainty where to find the debtor ;" the only uncertainty that can well exist between debtor and creditor. Whenever this uncertainty exists, the creditor shall be excused if he does not arrest the debtor. Now, for argument's sake, let us admit, that although the clause of limitation in the act of Congress aforesaid has no such provision as to the return of the offender within the State or Territory where the offence was committed ; yet that by equitable construction it should be considered as if it had such provision. Then, how should it be interpreted ? Say to the same extent as the Maryland statutes have been interpreted in civil cases. Then should not the return be such that the government may be at no uncertainty where to find the offender ? If it be so, should not the traverser, in order to avail himself of the clause of limitation, make it appear that no uncertainty where to find him, did exist ? But this uncertainty can be disproved or removed by only two facts ; first, actual knowledge on the part of the government that he was within this district, or a presumed knowledge from the duration or publicity of his stay, that he was here ; and secondly, that he was known to the government to have been the offender. For, admitting that he was known to have been here, it is the same thing as if he had not been here, if it was not known to the government that he was the offender, or at least, that they had no just grounds of suspicion that he was the offender. If, then, I had been of opinion that the limitation proviso in the Act of Congress admitted of the latitude of construction that the return of the traverser to this district relieved him from the penalty of having fled, (which, however, I cannot agree to,) surely such return ought to have been under circumstances which removed from the government all uncertainty as to where he was to be found, and uncertainty as to his identity ; for, let it be remarked, that of all uncertainties, those of knowing the perpetrator of a heinous crime, is perhaps the greatest ; the very purpose of the criminal is to create this uncertainty ; secrecy is his shield ; now this cannot be between creditor and debtor ; and the only uncertainty in such case is as to the place where the debtor may be found ; and if such uncertainty is caused by any act of his, it shall not avail him against the creditor. I say, then, that if I had concurred in any such construction of the limitation clause in the Act of Congress aforesaid, I should have required the jury to have been satisfied that the traverser was known to the government to have been the perpetrator of the crime with which he is charged ; and that his

stay, moreover, in this district, was so public, and of such duration, that the government either actually knew of it, or might be presumed, with reasonable diligence, to have known of it.

But I view this clause of limitation differently from my brothers. The exemption from liability or prosecution, after a lapse of two years, is a free and spontaneous and generous privilege, accorded to offenders by the bounty of the legislature; it is a mere act of grace, growing out of no meritorious or equitable claim on the part of the transgressor, but from the characteristic benignity of our laws; it can be forfeited but in one way, by fleeing from justice; if he flees, he forfeits the privilege; it is a penalty which, once incurred, cannot be relieved against; we have no equitable jurisdiction over it. It cannot be in the power of the offender, by any act of his, to restore himself to the situation he was in before fleeing. The language of the proviso is certain, positive, and absolute; exhibiting no doubt as to its interpretation; affording no ground for an equitable extension.

I, therefore, do not agree with the majority of the Court in giving this instruction to the jury.

As to the second instruction, that if the jury believe, from the evidence, that the traverser was not present at the burning of the treasury, aiding and assisting therein, but was at a distance therefrom, however guilty he may have been of procuring others to do the deed, that he is an accessory only, and they must acquit him on this indictment. I question much the propriety of giving this instruction; instructions not warranted by the law and the evidence are mischievous, as having a tendency to perplex the jury, and to divert their minds from the true objects of their consideration. This instruction would be a very proper one, if the facts proved by the evidence afforded any just grounds for granting it. Unless the evidence furnishes matter to warrant the instruction, it is irrelevant to the inquiry; a mere abstract proposition, having no connection with the facts in the case. Now there is not a particle of evidence, either of living witnesses, or of circumstances, which involves any other human being in the transaction, than the traverser and his brother; no evidence of the slightest character which furnishes a suspicion even, that the agency of any other than the traverser and his brother were concerned in it; and if they did it not, nobody did it, for *de non apparentibus et non existentibus eadem ratio est*; the traverser's counsel might as well have prayed an instruction that if the jury believed, from the evidence, that the treasury building was fired by lightning, that they must acquit the traverser; would the Court grant such an instruction in the absence

of the slightest evidence of such a phenomenon? Every instruction of a court to a jury must be warranted by, and presupposes some evidence, for they always begin with an hypothesis, as, If the jury believe from the evidence, &c. &c. Now if there be no just grounds for the hypothesis there is none for the instruction; for the instruction follows, and cannot take place but on the hypothesis; there must be evidence to justify the hypothetical form of the instruction. Of what avail is it to instruct the jury that they must find so and so, if there be not evidence on which the jury may find according to the instruction? Now whether there be any evidence at all of any supposed statement or case is for the Court to say, and if there be none in their opinion they will not grant an instruction, which can only be granted on the fact of there having been such evidence. Now either the traverser and his brother both burnt the treasury together, both acting together as principals, or nobody burnt it; not a glance of suspicion falls from the evidence on any other; no other human being has been talked of, heard of, or to whom even suspicion could attach, but the Whites. If, however, it be contended that Henry alone burnt the treasury, and although instigated or incited by Richard to do the deed, Richard was not present, this would justify the instruction if there was the slightest evidence of the fact; but the evidence proves the contrary; for they both left Washington together in the same gig, and remained together during the whole night, and continued together until ten o'clock the next day, when they reached Baltimore; therefore Henry could not have burnt the treasury alone; all this is proved by the traverser's own and only witness to these facts; therefore as no other person is charged to have done the deed, or had a share in it, as there is not an atom of evidence inculcating any other, or creating a suspicion of the agency of any other, from which any inference could be drawn by the jury implicating any other; as there is no proof that the Whites were separated after they got into the gig at Washington, before the building was burnt, and until they arrived at Baltimore after the building was burnt, Henry alone could not have done it; but if they burnt the building Richard must have been present acting and participating in it, or they neither of them were concerned in it.

The traverser, then, must have been a principal, or he is innocent of the crime. There is no evidence whatever that he could have stood in the relation of an accessory. It ought to be proved against him. The whole evidence in the case negatives the possibility of his having been an accessory. I have too often seen these kind of lures thrown out like a tub to the whale, to draw the jury's attention from the main object of their inquiry, and

have regretted that such a practice has so frequently obtained indulgence; but the utter despair of being able to correct the evil, and the heat and contest likely to ensue from such an effort on my part, has deterred me frequently from interference, though often prompted to interpose. I should, for these reasons, refuse this instruction also; for if the traverser is permitted to escape conviction by irrelevant instructions and needless perplexing law points, calculated to embarrass a jury not being skilled in the science, nor possessing that professional tact and discrimination which can alone be acquired by long study and familiarity with the principles and nice technicalities of the law, where every word has weight, and often a peculiar technical sense, I should deservedly incur the penalty of the sentence which runs in these words, "*dum reus absolvitur, judex damnatur.*"¹

¹ On a subsequent day, Judge Thruston read in court the following paper:

In the following remarks I am furnished with an occasion of noticing certain charges which have been exhibited against me of arguing to the jury on matters of fact, charges founded either in malice or a want of a due understanding of the true lines of demarcation between matters of law and matters of fact: this instruction affords, I say, a fair occasion to give my views of the distinction between matters of law and matters of fact, because it is one of my main objections to the instruction that it involves both matters of law and matters of fact. I take matters of fact to be, in a legal sense, such as by competent testimony, either written, oral, or circumstantial, go to prove the allegations or averments, in any plea, on which an issue is made to be tried by a jury. I take matters of law to be the judgment of the law upon those facts, if proved to the satisfaction of the jury.

If a court give an instruction to a jury, or charge a jury, such instruction or charge must necessarily be hypothetical, because the court cannot assert any fact to be true, or proved by the evidence, but must leave such truth or proof to be judged of exclusively by the jury; but they may inform the jury what the rule or principle of law is, if they shall be satisfied of the truth of the facts attempted to be proved; therefore, an instruction by a court to a jury is always in this hypothetical form: "If the jury believe from the evidence so or so, then the law is so or so," and so must be a charge by the court to the jury.

Of all nice questions, and among those the least understood, is that of what is matter of law and what is matter of fact.

I cannot, perhaps, illustrate this question better, than by taking for example the instruction given by the Court to the jury in Richard White's case, transcribed below, on which I think it will be made apparent, to any intelligent mind, possessing the faculty of rational discrimination, that in that memorable instruction the Court did so confound law and fact, that in the hypothetical part of the instruction matter of law is stated as matter of fact, and that on the legal inference or rule of law, as laid down by the Court, drawn from the supposed matter of fact, they have based the rule upon both matters of law and matters of fact.

As no objection was made to the instruction on this ground, it seems clear, that the Attorney for the United States did not discern this valid objection to the instruction, or was deceived by the want of clear perceptions of the distinction between matter of law and matter of fact. The instruction was in these words, namely:

"If the jury believe from the evidence that the departure from this district by the traverser, on the evening of the 30th of March, 1833, or at any time afterwards within two years, was, for the purpose or with a view to avoid punishment for the offence of burning the treasury building, or for any other offence, this was a fleeing from justice,

MORSELL, J., thought there was evidence enough to justify the prayer of the defendant's counsel for the instruction as to the question of principal or accessory.

and the statutes of limitations is no bar ; unless the jury should also believe that the said prisoner afterwards returned to the county of Washington, and that his return was so open and public, and under such circumstances, that opportunity was afforded by the use of ordinary diligence and due means to have arrested him ; and that two years and more have elapsed from that period to the time of finding the indictment in this case."

Now the Court heard all the evidence which the jury did, relating to the traverser's return, and of its openness and publicity, and all the circumstances attending such return. and what was that evidence ? as follows :

The traverser came to this city on Sunday evening in the stage, as he said, from Baltimore, and lodged at Mrs. Howard's, a boarding-house in rather a retired part of the city, where he breakfasted the next morning, and after breakfast walked, in company with Mr. Howard, to the capitol, Congress being then in session, and went into the Congress library there, and left this city before dinner the same day, to go (as he said) to Leesburg, in Virginia.

This was all the evidence of the openness and publicity of the traverser's return and the circumstances attending it, except that the circumstances, as proved by the prosecutor's witnesses, very much impaired the force of the circumstances, as bearing in favor of the traverser ; because competent evidence was offered to the jury that the traverser was, at the time of such return, travelling under a feigned name ; and moreover the testimony of another witness, Mr. Eaton, rendered it questionable whether the traverser did actually return, as stated by Howard and wife, at the time alleged by them ; but that some other person, by the name of White, and not the traverser, was the person supposed to be the traverser by said Howard and wife.

I have thus stated all the evidence as to the traverser's return, and the circumstances attending it, upon which, and which alone, the Court ought to have instructed the jury as to the inferences of law upon those facts ; but what did they do ? They left the jury to draw inferences of law themselves, from those facts ; and then, upon the jury's first being satisfied with the truth of those facts, and drawing such inferences of law from those facts as the instruction declares, they were then to be governed by the Court's inferences of law, from the jury's inferences of law, drawn from the facts.

When the court inform the jury that the statute of limitations is a bar, if the jury believe from the evidence that the traverser's return and the circumstances attending it were "*so open and public, and under such circumstances, that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him,*" let me ask if these underscored words are any part of the evidence, or facts in the case ; or are they not rather matters of law arising out of the facts ? The facts are stated in full above, all which the Court heard, and every circumstance connected with the traverser's return, as fully as the jury. Is it not upon those facts only that the instruction of the Court should have been given, and not upon the jury's opinion of the legal inferences from those facts ? Why should the Court, possessed as they were of every word of the evidence, leave it to the jury to say what constituted openness and publicity ? Surely they were as competent to judge of this as the jury ? Is it the exclusive province of the jury to say how much exposure of one's person, in this or that place, and for what length of time, amounts, in the eye of the law, to openness and publicity ? But this is not all : the jury are empowered also to determine other more clear questions of law, as inferences from the facts of which evidence was offered by the witnesses ; they are to say that the traverser's return, &c., was not only open and public, but under such circumstances that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him. Arrested ! by whom ? Opportunity also was to be inferred from the facts stated in evidence ; of this opportunity the jury were to be the exclusive judges. Now, opportunity means "suitableness of circumstances to any end ;" then opportunity, in the instruction, means that the traverser was in circumstances suitable to be arrested, for that was the end contemplated in the instruction,

CRANCH, C. J., said, that the absence of evidence that the defendant was present at the burning, was sufficient to justify the prayer.

of which the jury were to be satisfied, and of which they were to be the judges. But this opportunity to be arrested, or being in circumstances suitable to be arrested, comprises things of which there was not a particle of evidence; there was no evidence that the government, or any of its officers, or any other person whatever, had the least knowledge that the traverser was the incendiary of the treasury building, or, if possessed of this knowledge, that he was at that time within the county of Washington. How was it possible, then, that the short stay of the traverser in the county of Washington afforded an opportunity or circumstances suitable to the end of arresting him? Here, then, it was left to the jury to say that there was such an opportunity, when it is evident that it was a moral impossibility to have arrested him, and an utter lack of evidence to warrant an inference of such opportunity. Was it not, then, entirely a question of law whether the evidence could authorize such inference by the jury? Was it not agitated between the judges as a question of law, and did not Judge Thruston, although overruled by the Court, state it as his opinion, that to authorize such an instruction at all, the jury must be satisfied that the traverser was known to have been the incendiary, and known to those legally authorized to have arrested him to have been in the county of Washington; or, under such strong suspicions to have been so, as to have justified his arrest. It is true, the other two judges did verbally tell the jury that such knowledge or suspicion was not necessary to have been proved; then it ought to have been made part of the instruction, before it should have been left to the jury to determine what circumstances afforded an opportunity to have arrested the traverser. Without appearing on the face of the instruction itself, it makes the instruction, or rather the important word "opportunity," a perfect solecism, a most inopportune word. An instruction should contain on the face of it every thing material to warrant its being granted; and should not be patched up with verbal supplements. If, then, opportunity to arrest an offender is a compound idea, involving a question of law, as it clearly did in this case, because involving, according to the opinion of one of the judges, a knowledge on the part of the government that the traverser was the offender; and this law question was settled by the Court overruling, by a majority, the judgment of one of the judges, what was this but leaving an inference of law to be drawn by the jury from the facts in the case; and as to the point contested by the judges, without any evidence whatever? Again, if there be doubt on this point, there seems to be none that the other parts of the instruction are questions of law. The jury are left to determine that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested the traverser. Here the jury are to determine what ordinary diligence is; that is to say, that the government were or were not guilty of laches; for ordinary diligence is the opposite of *crassa negligentia*, or gross laches. Is laches a question of fact, or an inference of law from facts to be judged of by the court and not the jury? When the Court hear all the facts, is it not their province to say whether they impute, in the eye of the law, laches or not? and, if asked to instruct the jury whether the facts proved by the evidence imply laches or not, shall a court adjudge that it is the province of the jury, and not theirs, to determine this point? Again, the jury are left to judge of the use of due means. Is this a question of law or fact? Clearly the first, it seems to me; "due means" imply "lawful means." Now what are lawful means, is a question involving constitutional law, as well as common law. The fifth article of the amendments to the Constitution of the United States declares, "that no person shall be deprived of life, liberty, or property, without due process of law;" and the fourth article says, "no warrant shall issue to seize the person but upon probable cause, supported by oath or affirmation, describing the person to be seized." Now, although the Court had judicial notice that the government were utterly ignorant of the traverser's having been the incendiary of the treasury building; or, at least, that there was an absence of the least evidence that any knowledge of his having been such incendiary could have been imputed to them, or to any other person, or that he was in the county of Washington; and that it was impossible, pursuant to the said fourth arti-

The jury retired to consider of their verdict a little after 12 o'clock, on Thursday, the 12th of January, and having been

cle of the Constitution, to describe the person, so as to have authorized a constitutional warrant to have been issued to arrest him, or to have enabled the government to have used "due means" to arrest him, yet they leave it to the jury to determine and adjudge that these "due means" were in the power of the government. But to say nothing of this ignorance of the traverser's having been the incendiary, on the part of the government, and he was in the county of Washington, are not "ordinary diligence" and "due means" pure questions of law growing out of the facts as proved by the evidence, to be determined by the Court and not the jury? What is "ordinary diligence?" Does it mean "reasonable diligence?" Then if the jury find that the government was afforded an opportunity, by "ordinary diligence," to have arrested the traverser, and did not do so, they were guilty of "laches," and so they, and not the Court, are to adjudge what degree of negligence amounts, in a legal sense, to "laches." Again, "due means" involve matters of fundamental as well as common law, as I have shown, from the fourth and fifth articles of the Constitution. Did the jury know that "due means," otherwise "lawful means," required an oath to be made by a competent witness, charging the traverser as the incendiary? that a warrant must be awarded and issued by a magistrate? that this warrant must be put into the hands of, and executed by, a sworn officer? Are not all these points of sheer law? Did the jury know, or were they informed, that "due means" comprised all these processes? or did the evidence which I have stated fully above, admitting the jury to have been competent to judge of these nice points of law, authorize the Court to leave it to the jury to infer any such "due means?" Thus the Court, on the aforesaid instruction, first left it to the jury to say whether or not they believed that the traverser did return to the county of Washington, in the manner and under the circumstances as stated by the traverser's witnesses. This was certainly very proper. Although there was contradictory and pretty strong evidence on the side of the prosecutor, it was proper for the jury to weigh the evidence, and to judge according to their impressions of it. These are mere facts; but the Court leave it to the jury to say whether or not it was so open and public as, &c. This part of the instruction is at best questionable; it is questionable, as the Court heard all the evidence, whether they, and not the jury, should not have adjudged it to have been so "open" and "public" as to have warranted the residue of the instruction. Then they leave it to the jury to say that it was sufficiently "open" and "public" to have afforded an "opportunity," by "ordinary diligence" and "due means," to have arrested the traverser. I have endeavored to show that the Court erred in this part of the instruction; for if the jury were permitted to say whether the government had used "ordinary diligence" or not, it was leaving to them to draw an inference of "laches" on the part of the government, which seems to me to be a question of law. They were also permitted to infer, that the government did not use due means to arrest the traverser; and I have endeavored to show that "due means," which are the same as "legal means," involve questions of fundamental, as well as common law. I will now present this question in other aspects. Suppose Howard, the only witness to White's public exposure of himself, for he was the only witness who testified that White was in the streets of Washington, or in the capitol and library there: I say, suppose Howard had been asked this question. Do you think White's exposure of his person in Washington, when he walked from your boarding-house to the capitol, &c., was so open and public, and under such circumstances, that opportunity was afforded, by ordinary diligence and due means, to have arrested him? would he not, if a man of reasonable understanding, say that he could not answer that question? He would very properly object that ordinary diligence was a matter of law; that he could not say how much was to be done before the government could be prepared to arrest him: that due means was still more perplexing to him, for he was not lawyer enough to know what due means, or legal means were: but the Court would not have permitted such a question to be put to the witness, as involving mere matters of opinion on points of law.

Let us now take a view of this instruction in another aspect. Let us suppose the evidence of Howard and wife to have been given, stating all the circumstances

United States v. White.

out all night, came into Court on the morning of the 13th, and said they found the defendant guilty of burning the treasury building, but acquitted him on the plea of limitations.

of the traverser's return to this district as it was given to the jury by the said witnesses, and the Attorney for the United States had demurred to the evidence, it would in that case have been the exclusive province of the Court to have judged of the sufficiency of such evidence, as affording an available defence for the traverser. Would the Court have ventured to pronounce that such return, under the circumstances, as proved by Howard and wife, was so open and public, and under such circumstances, that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him? If the Court would not and could not have drawn such inferences, then it should not have been left to the jury to have drawn them. I say the Court could not, or at any rate ought not to have drawn such inferences. Let it be observed, that the Act of Congress "for punishing certain crimes against the United States," has given to offenders the benefit of the two years' limitation, upon the sole condition of not fleeing from justice; that if the condition be broken the offender has forfeited this benign indulgence; that the Court, notwithstanding, have extended this privilege beyond the letter, and adjudged that, although the offender, having forfeited the privilege, may be restored to it by returning to the district, and exposing his person to arrest. This is clearly, if any thing, an equitable extension of the terms on which the offender may claim the benefit of the limitation. There is no such provision in the law. If the Court will thus stretch the law to embrace what they suppose to be an equitable construction of it, should they not at least pay some regard to fairness and equal justice? and not cause such equitable construction (if it can be so called) to bear altogether on one side? Now, although it may be admitted, that if two years elapse from the commission of the offence to the finding of the indictment, that the offender is absolved, by the clause of limitation, from liability to punishment, although the government remained in perfect ignorance of his having been the offender, yet very different ought the construction to be when the Court undertake to add new terms to the law, and adjudge that if the offender having once fled, and thus forfeited the benefit of the two years' limitation, that he may be restored to it by returning to the district, and remaining therein half a day, the government being entirely ignorant that he was the incendiary, or that he was here. What kind of equity is this? It was morally impossible that the government could have arrested him, even had his stay here been ever so long or ever so public, unless such knowledge can be forced upon them. Let it be understood, that by the government I mean those executive officers representing the government, whose especial duty it is to arrest and bring to punishment violators of the law. If, with such knowledge that the traverser was the offender, and that he was here, in reach of legal process, the government neglected for two years to have here arrested him, then indeed laches might reasonably be imputed to them, and there would have been something like reciprocity and fairness in such construction of the statute.

I have been utterly in the dark, as to the grounds upon which the aforesaid instruction was given to the jury, inasmuch as the Court have assigned no reasons for having given it. It cannot be from any analogy drawn from the statutes of limitation in civil cases, because it is an express provision of the statute, that if the debtor returns to the county after absconding, that the creditor must sue him within the time mentioned in the law after such return, or the debtor shall have the benefit of the limitation; if he do not so sue, there would be laches without excuse, because the debtor is not only in such case within reach of process, but is known to his creditor, and the law expressly declares that the time limited for bringing suit shall commence from the date of the debtor's return. But the government did not know that the traverser was the offender, and therefore it was morally impossible to have arrested him. Here the analogy fails. It fails also in this: the law of Maryland expressly gives the benefit of the limitation to the returning debtor, and dates the commencement of the running of the time from the period of the debtor's return. But the Act of Congress dates the commencement of the two years from the time of the commission of the offence; but the Court have amended the statute, and declared that the time for the commencement of the running

This not being a formal verdict, it was agreed that the district attorney, and the counsel for the defendant, should each submit

of the two years shall be that of the return of the offender to this district. Here also the analogy fails. Such new date of the beginning of the time of limitation was in Maryland by express statutory provision; here it was fixed by a judicial supplement to the act of Congress.

Again; admitting for argument's sake that the Court were right in annexing this supplement to the Act of Congress, and in leaving also to the jury to draw the questionable inferences above descanted on from this supplementary extension of the act, yet is it not a rigorous and severe construction of this supplement, to subject the government to the penalties consequent upon laches, for having omitted one occasion only of arresting the offender, where the time of his stay in this county was so short, and his exposure of his person so limited, that it would have been an uncommon accident if he should have been seen by any of those executive officers of the government whose peculiar province it is to arrest offenders, and would have required uncommon industry to have obtained the due means of arresting him? Some one must be found to charge the offender on oath. It cannot be presumed, that he could have been known to everybody either to have been the offender or that he was in the county. Suppose he was known to the President and cabinet to have been the offender. Did any of them see him, or know that he was here? Suppose the marshal had this knowledge; did he see him, or know that he was here? Did any deputy marshal or constable see him, or know that he was here? Did any of these officers, admitting that Richard White was known to have been the incendiary, know his person? Now by the Court's instruction the government had two years from the time of White's return as aforesaid to have arrested him; is it not a hard, and a rigorous, severe, and unequal interpretation of the Court's own supplement to the law, to subject them to the forfeiture of their right to prosecute and punish the transgressor, because they did not seize one single and questionable chance of arresting him, only within the possibility of their having done so, within the whole two years?

Let us again take another view of this instruction. After having been given to the jury, they withdraw to their room; the foreman takes up the instruction and reads it to the jury: suppose, then, one of the jury rises, (and it is a matter of surprise to me that it did not so happen,) and says, Mr. Foreman, if I understand this instruction, we are authorized to say, that if ordinary diligence, and due means were used, White might have been arrested; now, Mr. Foreman, I do not know what due means are, I am not lawyer enough to know this; I therefore cannot say, unless I know what these due means are, that are to be used, whether White's stay here was long enough to have provided them; I therefore cannot judge whether by ordinary diligence, he could have been arrested or not. Now here is matter of sheer law, that ought to have puzzled any jury, (and that they were not so puzzled is matter of surprise,) which the Court permitted the jury to pass upon, not as facts to be found by them, as the basis of the Court's inference of law, but as inferences of law to be drawn by themselves from the facts as detailed by the witnesses. Well, let us suppose the foreman, (and no improbable supposition,) no better lawyer than the juryman who applied to him for information of what due means were, in the contemplation of law? how could they get on? The next step would have been, to come into court to ask for explanation of those terms of fine legal import. Suppose them in court; the foreman says, May it please your honors, we are at a stand; we do not know what due means signify according to law; it seems to us that the Court have devolved upon us the duty of drawing inferences of law from facts, and we believe that our province is to find facts, and leave to the court to draw inferences of law; but if we are bound to draw these inferences, we beg your honors to tell us, what those due means, mentioned in the instruction, are; for we are not learned in the law, and believe that some ceremonies are necessary before an American citizen can be subject to be seized in his person, and we do not know what those ceremonies are. The Court, to satisfy these inquiries of the jury, would say to them: Gentlemen, it is very true, that what constitutes a legal or due arrest of a citizen, is matter of law, and often of nice law; the

to the jury such form of a verdict as he supposed would be conformable to the intention of the jury, and that they should

fourth and fifth articles of the amendments to the Constitution of the United States, will teach you what is to be done, to justify the seizure of a citizen's person; there must have been an oath made, by some competent witness, that White was the incendiary, and was in this county: this oath to be made before a magistrate; he must then work out his warrant directed for the apprehension of White; then this warrant must be put into the hands of some sworn officer, to execute; and then he must find out White in order to arrest him; these are the due means, or legal means meant by the instruction; but the foreman would very naturally reply, May it please your honors, we did not know all this law; had the Court stated specifically in the instruction what was necessary to be done under the terms, due means, we might, perhaps, have saved the court the trouble; we humbly conceive, all these processes of law should have been specially set forth in the instruction. Again, as to this word opportunity. It was leaving to the jury to say that there was opportunity to have arrested White, when by the very terms of the verbal part of the instruction, it is manifest there was no opportunity for executing such purpose; for there was no evidence that the government, or those representing the government, and whose peculiar duty it is to arrest offenders, did know that White was the offender, or that he was even in this county at the time alluded to in the instruction; it was morally impossible, if even there was a physical possibility to have arrested him, to have done so, and yet the Court leave it to the jury to say that there was such opportunity. and at the same time inform them, that it was not material to constitute this opportunity, that White should have been known to have been the offender. Now is not this knowledge indispensably necessary to create the opportunity? The word opportunity, therefore, was too broad and comprehensive a term to have been used in the instruction; the evidence did not justify it; to have presented this opportunity, knowledge of the offender was required. It is one of the natural elements or ingredients of opportunity, one of those suitable and indispensable to the end of arresting White; for without it, it was not possible to have attained that end. It was a contradiction in terms, to leave it to the jury to say there was such opportunity, and at the same time tell them that one of the essential elements or ingredients of this opportunity need not be or exist; it therefore seems to me that what the Court should have said was, that if White's appearance in this county, was in their estimation sufficiently open and public, that then they might judge and say if they so thought, that there was time enough and not opportunity afforded thereby, by the duration of his stay in this county, to have arrested him; but to leave it to the jury, by the written part of the instruction, to say that there was this opportunity, when by the verbal part of the instruction, informing them that knowledge of White's being the incendiary was not necessary, for want of which it was morally impossible to have arrested him, was leaving to the jury to find that a thing impossible to be done, might nevertheless be done. In fact, taking the whole of the instruction together, the verbal part, and the written part, the whole was rendered a *filio de se*. The word opportunity, then, should not have been in the instruction; but it seems to me that to have made it conformable with the true meaning of the Court, it should have run thus; "unless the jury should also believe that the traverser afterwards returned to this county, and his return was so open and public, and under such circumstances that (had the government known that he was the incendiary) they ought to have known that he was in this county, and that his stay here was long enough, by the use of ordinary diligence and due means, to have arrested him. This form of instruction would have left to the jury to find precisely what the Court meant to have left to them; namely, that the traverser was here so openly and publicly, and under such circumstances, that the government might, by ordinary diligence and due means, have discovered that he was here, and had time enough, with such knowledge, to have arrested him. This was certainly all that the Court did mean to leave to the jury; but to leave to the jury to say that there was opportunity to have arrested him, was leaving them to find, that which the very terms of the instruction, taking the verbal and written parts together, was what was impossible to have been found.

retire and bring in their verdict in that form which they found correct. After retiring, the jury returned and delivered their verdict in the form prepared by the defendant's counsel, as follows: "We of the jury are of opinion that the offence as charged was committed by the prisoner; and find him not guilty upon the plea of limitations, more than two years having elapsed, from the committing of the offence to the finding of the indictment."

This verdict was recorded; and on 18th of January, 1837, *Mr. J. R. Key*, for the United States, moved for a *venire de novo*, and the defendant's counsel moved for judgment in favor of the defendant, upon the verdict.

In support of the motion for a *venire de novo*, *Mr. J. R. Key* contended that the verdict was argumentative, and imperfect, in not finding the matter in issue, which, if the limitation of time had been specially pleaded, and the pleadings made up at full length, would have been, either whether the defendant fled from justice, or whether, after fleeing, he returned, &c., so that he might have been arrested. Upon this point he cited the opinion of this Court in *Watkins's case*, published in the National Journal of 29th July, 1829. Co. Lit. 227 a, and *United States v. Patterson*, 2 Wheat. 221, 225.

(*MORSELL, J.*, suggested a query whether the finding of the defendant not guilty upon the plea of limitations, if it stood alone, would not be a sufficient finding of the issue joined upon the plea of limitations; and if so, whether the words "more than two years having elapsed," &c. might not be considered and rejected as surplusage.

THURSTON, J., thought that if an issue had been joined upon the plea of limitations, it would have been upon the fleeing from justice; or upon the return of the defendant within two years.)

Mr. J. R. Key, if the issue before the jury had been whether he fled, or returned, &c. Some of the jurors may have been of one opinion, and some of another, upon those points, but all may have agreed that the two years had expired, &c., for that fact was not disputed. It is like the case upon the issue of *solvit ad diem*, cited in 8 Wheeler, 312, from 6 New Hampshire Rep. 104. *Mr. Key* also cited *Rowe v. Huntington*, Vaughan, 75, 76; 5 Burr. 2662; *Evans's Harris*, Ent. 335; *Coffin v. Jones*, 11 Pickering, 45; *Triplett v. Micon*, 1 Randolph, 269.

Mr. R. J. Brent, for the defendant, *contrâ*. This is not an argumentative verdict, the words "more than two years having elapsed," &c., may be rejected as surplusage. The jury have found that more than two years had elapsed, &c. which is a bar; and the pleadings do not show that the fleeing from justice was in issue; nor that the United States would have so replied. It

was incumbent upon the United States to show that the offence was committed within two years next before the finding of the indictment. Lord Raymond, 1521. The jury are not bound to find a negative in any case. 1 Wilson, 57. By finding for the defendant on the plea of limitations, they have in effect found that he did not flee from justice, or that there was no evidence of it.

In pleading a statute, it is not necessary to show that the defendant is not within the proviso. The verdict, therefore, is not imperfect. Every thing not found in favor of the plaintiff is negatived. 2 Lord Raym. 1585; 1 Wils. 55, 56; 1 T. R. 141; *Worley v. Isbel*, 1 Bibb, 250; 2 Burr. 698; Hobart, 54. Verdicts are to be favored. 3 T. R. 659; *Garland v. Bugg*, 1 Hen. & Mun. 377.

The jury could not have found the defendant not guilty on the plea of limitations, if the United States had proved the fleeing from justice. Surplusage does not vitiate. Com. Dig. 252, Pleader, § 28; 2 Com. Dig. 258, s. 41; *Thompson v. Betton*, 14 Johnson, 86.

Even if the clause of limitation had been specially pleaded, and the pleadings had run on to the issue whether the defendant openly returned after fleeing from justice, and the verdict had been that they find for the defendant upon the plea of limitations, it would, in effect, have been a finding of the issue for the defendant.

The defendant's counsel offered to read the affidavits of some of the jurors as to their intention in finding the verdict, but the Court, *nem. con.* refused to hear them. (See *Woodfall's case*, 5 Burr. 2665.)

Mr. F. S. Key, in reply. The issue upon the plea of limitation would have been, whether the defendant fled or returned, &c. The verdict does not find the fact one way or the other, but has found a fact not in issue. It is therefore imperfect; and it gives a reason for that finding; it is therefore argumentative and void.

The United States were not bound to aver, in the indictment, that the offence was committed within the two years; but the defendant must plead, or allege it affirmatively, namely, that more than two years had elapsed, &c. Com. Dig., Pleader, s. 22; Hobart, 54, note 2, to the American edition.

THE COURT, (CRANCH, C. J. *contrà*,) awarded a *venire de novo*.

MORSELL, J., was of opinion that the verdict was argumentative, and therefore bad.

CRANCH, C. J., delivered the following opinion: "This is an indictment against Richard H. White, for burning the treasury building on the 30th of March, 1833. The indictment was not found until the 30th of March, 1836.

In a criminal case the defendant is permitted to avail himself of the limitation of the statute of April 30, 1790, upon the general issue, and the United States may rebut it by evidence that the defendant was a person fleeing from justice; and if the United States can show that at any time during the two years he fled, the defendant (according to the opinion of the Court given upon the trial) may rebut this by evidence that he appeared publicly and notoriously, so that by reasonable diligence he might have been arrested. Such was the course in the present case, and the jury found the following verdict: "We, the jury, are of opinion, that the offence as charged was committed by the prisoner, but find him not guilty upon the plea of limitations; more than two years having elapsed from the committing of the offence to the finding of the indictment."

Upon this verdict the defendant has moved for judgment in his favor; and the attorney for the United States, has moved for a *venire de novo*, upon the ground that the verdict is imperfect.

In criminal cases, the pleadings subsequent to the indictment are generally considered as *ore tenus*.

If they had, in this case, been reduced to writing, so far as they relate to the limitation of time, the defendant would have pleaded in substance that the indictment was not found within two years from the time of committing the supposed offence; to this the United States would have replied that the defendant was a person "fleeing from justice;" to this replication the defendant might have put in a general rejoinder, upon which an issue might have been joined; or he might have replied (according to the opinion of the Court given on the trial) that, after so fleeing, he returned, and appeared openly, publicly, and notoriously in this district, or elsewhere in the United States, so that with reasonable diligence he might have been arrested; to which the United States would have put in a general surrejoinder, upon which the issue might have been joined, so that the plea of limitations would have resulted in an issue upon the fact of flight, or the fact of return, &c. There would then have been two issues for the jury to try. 1st. The general issue of not guilty; and 2dly, The issue raised upon the plea of limitations. If the jury had found either issue for the defendant, it would have been sufficient for judgment in his favor. If the jury had said that upon the first issue they find the defendant guilty, and upon the second they find for the defendant, their verdict would, in such a state of the pleadings, have been good.

I think this case must be considered as if such had been the pleadings upon the record, and such the verdict. A verdict is not subject to the nice criticisms which may be applied to

special pleadings. If the issues are substantially, though informally found, the court may work it into form. *Hawks v. Crofton*, 2 Burr. 699.

As to the first issue the jury say, they "are of opinion that the offence, as charged, was committed by the prisoner." This seems to be a clear finding the defendant guilty upon the general issue. As to the 2d issue, they "find him not guilty upon the plea of limitations." This, I think, is substantially a finding of the issue upon the plea of limitations, for the defendant. It is perhaps informal to say that they find the defendant not guilty on the plea of limitations, but I have no doubt that their meaning was that they found the issue, upon that plea, for the defendant. And the issue upon that plea, according to the conduct and argument of the parties before the jury, and the instructions given by the Court, was either, whether the defendant was a person fleeing from justice, or whether, after fleeing, he returned openly, &c., so that with reasonable diligence he might have been arrested.

This, certainly, is not a special verdict purporting to state all the facts proved to the satisfaction of the jury, and referring the matter of law to the Court: nor is it a partial verdict, finding the defendant guilty of part, and acquitting him of the residue of the charge; nor do I think it an imperfect verdict, for it answers substantially to the whole issue, or issues in the case. And I think that the latter words, "more than two years having elapsed," &c., may be rejected as surplusage. They only state a fact admitted by the pleadings if made up in form, and do not purport to be the only fact upon which their finding is founded. They create no repugnancy in the verdict; and "if the jury find the point in issue, and also another matter out of the issue, the latter finding," (says Mr. Justice Story in the case of *Stearns v. Barrett*, 1 Mason, 153,) "is void and may be rejected as surplusage." The fact, that two years had elapsed, was a matter out of the issue, for it was admitted in the pleadings." So if they find a matter within the issue, if it be not contradictory, it may be rejected as surplusage. Sufficient is found to enable the Court to collect the point in issue out of the verdict; and if so, the same learned judge, in the same case, says, "it will be sufficient." I think the verdict is "expressed substantially in the terms of the issue," and is therefore sufficient ground of a final judgment for the defendant.

The Court, however, is of a different opinion, and a *venire de novo* is awarded.¹

¹ It was also said that the verdict is argumentative, and Com. Dig. Pleader, § 22 was cited. "So in all cases, a general verdict which finds the point in issue by way

UNITED STATES v. JOHN WILLIAMS.

In a prosecution for practising in the medical art and receiving payment therefor, in the District of Columbia, without having first obtained a license from the medical board of examiners of that district, or producing a diploma, the Court will not compel a witness to produce the medicine which he received from the defendant.

In such a prosecution the Court will not permit the United States to examine witnesses as to any specific instances, of which previous notice has not been given.

The application, by an oculist, of a liquid to the eyes, is not the practice of medicine, but rather of surgery.

In such a prosecution, it is competent for the defendant to show that the charter was vacated by non-user, and that there was no board of examiners *de jure*.

A board of examiners, not elected and continued in being by filling up vacancies, but elected annually, is not a legal board.

It is incumbent upon the United States to show that the medical society had a corporate existence at the time when, &c.; that the board of examiners was originally elected by, at least, seven of the members of the society; and that the officers were duly appointed; and that, although the minutes of the proceedings of the society should be lost, the United States must prove their contents, and show that at the time when, &c., there was a competent board of examiners *de jure*.

An information in the nature of a *quo warranto* will not be issued at the suit of an individual alone, to try the validity of a private corporation. But upon an indictment for a violation of the charter, the defendant may show that the charter was vacated.

A license to practise medicine is not necessary, if there be no board of examiners *de jure*.

In this case there were five indictments successively found against the defendant.

1. The first, in general terms, charged that the defendant, on the 15th of December, 1836, at, &c., "did practise, within the county and district aforesaid, in the medical art, and receive payment for his services, without first having obtained a license from the medical board of examiners of the District of Columbia,

of argument, is void, though the argument or inference is necessary." *Vaugh. 75*. This is a dictum of Vaughan, in arguing the case of *Rowe v. Huntington*, upon a special verdict, and is an inference which he draws from a case which he cites from 2 Roll. Ab. 693. *Barry v. Phillips*, N. 30, (meaning *Baugh v. Phillips*, l. 30.)

The case in Rolle is this, "In an action of debt for £20, if the defendant plead *quod solvit le* £20, and the issue is *an solvit ceo ou nemy*, and the verdict is *quod debet le* £20, this is not good, because it is only by argument. M. 13 Jac. B. R. *inter Baugh and Phillips*, adjudged on writ of error." S. C. 1 Rolle, Rep. 257. Here the issue was not directly found, and the fact in issue, (namely, whether the defendant had paid the £20,) could only be inferred by the finding that the defendant owes it. But if the jury had expressly found that the defendant had not paid the £20, and added, "he still owing it to the plaintiff," the matter in issue would not have been found by inference only, but directly. The fact that he had not paid it, would be no more an inference from the fact that he owed it, than the fact that he owed it would be an inference from the fact that he had not paid it. The doctrine of Vaughan cannot be extended beyond the case from which it was drawn. It does not apply to a case where the matter in issue is expressly and positively found, although the jury find something more which was not in issue. In the present case, the jury have, in effect, found the issue upon the plea of limitations, for the defendant, and there is no necessity of resorting to inference to support it, as there was in the case cited by Vaughan. I, therefore, do not think it an argumentative verdict, within the meaning of that case. See, also, Com. Dig. Pleader, 18, 26, 28; Hob. 54.

and without the production of a diploma; against the form of the statute," &c.

2. The second was like the first, excepting that it charged that he received payment for his services, "to wit, the sum of fifty dollars from John Mitchell, and the sum of fifty dollars from Joseph S. Wilson."

The jury were first sworn upon these two indictments; and upon the trial, *Mr. Key*, for the United States, asked *Peach*, the witness, to produce the two phials of wash or eye-water which the defendant had prescribed for the eyes of his daughter.

But the witness objected that he had made a solemn promise to the defendant not to suffer the wash to be examined.

Mr. Brent, for the defendant, cited *Starkie* on Criminal Pleading, 73.

The COURT (*MORSELL, J., contra*,) refused to compel the witness to produce the wash, considering the ingredients as immaterial, this not being a prosecution for fraud or malpractice; and *THRUSTON, J.*, said the defendant had a right to his secret.

Mr. Key then offered evidence of a specific instance of practice and receiving payment, not stated in the indictment, and of which no notice had been given, and contended that as all the instances of practice before the finding of the indictment constitute but one offence, he had a right to give in evidence any specific instance upon the general count, without notice.

But the COURT (*MORSELL, J., contra*,) rejected the evidence.

By the Act of Congress of February 16, 1819, [6 Stat. at Large, 221,] entitled "An act to incorporate the Medical Society of the District of Columbia," section 1, certain physicians therein named, "and such persons as they may, from time to time, elect, as their successors," are declared to be a corporation, by the name of "The Medical Society of the District of Columbia," and may hold property, not exceeding \$6,000, and apply the same "to such purposes as they may judge most conducive to the promoting and disseminating medical and surgical knowledge."

By the second section they are to hold four stated meetings every year, namely, on the first Mondays in January, April, July, and October. The officers are to consist of a president, two vice-presidents, one corresponding and one recording secretary, one treasurer, and one librarian, "to be appointed on the second Monday of March, 1819, and on the annual meeting in January forever thereafter, (not less than seven members being present at such meeting.)"

By the third section it is enacted, "that it shall and may be lawful for the said medical society, or any number of them attending, (not less than seven,) to elect by ballot five persons,

residents of the district, who shall be styled 'The Medical Board of Examiners of the District of Columbia,' whose duty it shall be to grant licenses to such medical and chirurgical gentlemen as they may, upon a full examination, judge adequate to commence the practice of the medical and chirurgical arts, or as may produce diplomas from some respectable college or society."

And by the fifth section it is enacted, "That after the appointment of the aforesaid medical board, no person, not heretofore a practitioner of medicine or surgery within the District of Columbia, shall be allowed to practice within the said district, in either of the said branches, and receive payment for his services, without first having obtained a license, testified as by this law directed, or without the production of a diploma as aforesaid, under the penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment; one half for the use of the society, and the other for that of the informer."

The COURT was of opinion that the giving of advice and the application of external remedies to the eyes was not the practice of the medical, but rather of the chirurgical art, and if it was an offence at all should have been so charged in the indictments.

Verdict, not guilty, on these indictments.

The grand jury then brought in a new indictment, containing four counts.

1. The first count charged that the defendant, not having been a practitioner of medicine or surgery within the District of Columbia before the 16th day of February, 1819, did, on the 15th of December, 1836, practise, within the county and district aforesaid, in the medical art, and receive payment for his services therefor, without first having obtained a license, &c., against the form of the statute, &c.

2. The second count was like the first, except that it charged him with practising in the chirurgical art.

3. The third charged him with practising in the medical art, and receiving payment for his services therefor, namely, fifty dollars from John Mitchell, fifty dollars from Joseph S. Wilson, and fifty dollars from Samuel Peach.

4. The fourth was like the third, except that the charge was for practising in the chirurgical art.

At the bottom of the indictment was this notice :

"Bill of particulars. Under this indictment the United States Attorney will offer evidence of the traverser's practising in the medical art, and in the chirurgical art, and receiving money therefor from the following persons : John Mitchell, \$50, Samuel Peach, \$50, Joseph S. Wilson, \$50, Samuel Carr, \$50.

"F. S. KEY, United States Attorney."

Upon the trial upon this indictment, *Mr. Brent* and *Mr. Hoban*, for the defendant, contended that the act only required a license to practice the whole medical art, or the whole surgical art, and did not apply to those who practised only in particular diseases, or in respect of particular organs, such as aurists, dentists, oculists, cuppers, bleeders, &c.

The branches mentioned in the statute are not branches of the medical art, or branches of the chirurgical art, but the whole medical art is one branch, and the whole surgical art is the other, of the two great branches into which the *ars medicatrix* is divided; the one using internal medicines, the other external applications.

Mr. F. S. Key and *Mr. John R. Key*, for the United States.

The statute intended to prevent the practice of any branch either of the medical or the surgical art, by unskilful and unlearned men, whether they pretended to practise for particular diseases, or particular organs, as general physicians or surgeons.

The COURT (*THRUSTON, J., contra*.) was of opinion that the statute was applicable to every branch of medicine and surgery.

Mr. Brent, for the defendant, having contended that the charter of the medical society had been surrendered, or abandoned, and the society dissolved, obtained a rule to show cause why an information in the nature of a writ of *quo warranto* should not be filed to try the question, and it was agreed that it should be heard as part of the present case.

The counsel for the United States contended that such an information cannot be issued at the suit of an individual alone. 2 Kent's Com. 313; Angell & Ames on Corp. 473; *Commonwealth v. Union Insurance Co.*, 5 Mass. Rep. 230; *Wallace v. Anderson*, 5 Wheat. 291; Angell & Ames, 76, 77, 470. The government may waive the forfeiture. And a judgment of forfeiture now entered would not relate back to the time of the defendant's practice.

Mr. Brent, Jun., admitted that on the ground of abuse there can be no *quo warranto* without leave of the government, but for non-user there may. There is a difference between declaring a forfeiture of the charter and the non-existence of the corporation. They do not pray the Court to dissolve the charter, but to declare it dissolved. They cannot kill the corporation without a *quo warranto*, but may show it to be dead, and a surrender may be presumed from the non-user. *Slee v. Bloom*, 19 Johnson, 456.

Mr. John R. Key, in reply. A mis-user, or non-user, does not destroy the charter.

The COURT (*MORSELL, J., contra*.) refused to permit the information to be filed; but decided (*CRANCH, C. J., contra*.) that it is

competent for the defendant to show in this trial that the charter was vacated.

The grand jury having, during the trial, brought in two more indictments against the defendant, the petit jury was, by consent, sworn upon them also.

One of them contained five counts, all charging the defendant with fraud, in obtaining money by false pretences.

1. The first charged that the defendant, being an evil-disposed person and common cheat, did fraudulently personate a certain John Williams, who had been known and esteemed as a doctor of medicine and oculist, and who had deservedly acquired great reputation for his learning and skill, intending to deceive and defraud the good people of the United States, in the county of Washington, in the District of Columbia, and more particularly one Samuel Peach, of his moneys, and by such false pretence, unlawfully, knowingly, and deceitfully obtained from him a large sum of money, to wit, the sum of fifty dollars, with intent to cheat and defraud, and did then and there cheat and defraud the said Samuel Peach of the same, &c.

2. The second count charged that the defendant, being an evil-disposed person and a common cheat, as aforesaid, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud a certain Samuel Peach of his moneys, did knowingly, fraudulently, and falsely pretend to the said Samuel Peach that he, the said John Williams, (the defendant,) was a doctor of medicine and an oculist, whereas in truth and in fact the said John Williams was not then a doctor of medicine, and was not an oculist, as he did then and there so falsely pretend to the said Samuel Peach; by which false pretences he then and there unlawfully, knowingly, and deceitfully obtained from the said Samuel Peach a large sum of money, to wit, the sum of fifty dollars, with intent then and there to cheat and defraud, and did, then and there, thereby cheat and defraud the said Samuel Peach of the same.

3. The third count charged that the defendant, being an evil-disposed person and common cheat, with intent, &c., as aforesaid, did knowingly, fraudulently, and falsely pretend to the said Samuel Peach that he, the defendant, was a person well skilled in curing the diseases of the eyes, and that he could cure the disease then existing in the eyes of Mary Ellen Peach, daughter of the said Samuel Peach; whereas in truth and in fact the said John Williams was not a person well skilled, &c., and could not cure the disease then existing in the eyes of the said Mary Ellen, as he so falsely pretended; by which false pretences last aforesaid the defendant did unlawfully, &c., obtain from the said

Samuel Peach a large sum of money, to wit, the sum of fifty dollars, with intent then and there to cheat and defraud, and did then and there cheat and defraud the said Samuel Peach of the same.

4. The fourth count was for cheating the said Samuel Peach of fifty dollars, by pretending to give advice and medicine that would cure the disease of his daughter's eyes, whereas, &c.

5. The fifth count was for cheating Peach of fifty dollars, under the false pretence that the defendant was an oculist, and was competent to give, and for fifty dollars to be advanced, would give advice and medicines fit and proper to be administered to cure the disease of his daughter's eyes, and by such false pretence prevailed on Peach to pay him the sum of fifty dollars; whereas in truth and in fact he was not an oculist, and was not competent to give and did not give such advice and medicines; but the advice and medicines which he did give were unfit and improper, &c.

The other new indictment brought in by the grand jury charged that the defendant publicly and falsely pretended that he was an oculist, and offered himself to the good people of the United States in the county of Washington, to be consulted and employed in diseases of the eyes, and was by great numbers of people so consulted and employed; and did offer and sell to divers, to wit, fifty of the said good people, for large sums of money, for his own wicked gain, unlawfully, fraudulently, and deceitfully, certain prescriptions and medicines, falsely pretended by him to be remedies for certain diseases of the eyes, with which the said persons were then and there afflicted, as good and proper remedies for the said diseases, and did so offer and sell and deliver, among others, to Samuel Peach, John Mitchell, Samuel Carr, and Joseph S. Wilson, the said pretended prescriptions and medicines as good and proper remedies, &c., whereas in truth and in fact the said prescriptions and medicines were not good and proper, &c., but unfit and improper, &c., and were well known to the said John Williams not to be good and proper, &c., but unfit and improper; by means of which said false pretences the said good people so consulting and employing the said John Williams, and the said persons so hereinbefore named as aforesaid, were cheated and defrauded of large sums of money, &c.

Mr. Key, for the United States, produced a release by the Medical Society to Rowland the informer, of all the society's interest in the penalty; and then offered to examine as a witness, *Doct. Sewall*, one of the members of the society.

The COURT, (*nem. con.*) was of opinion that *Doct. Sewall* was a competent witness in the trial of the issue upon the two

last indictments, but not in the prosecution for practising without a license, inasmuch as the Court, (CRANCH, C. J. dissenting) had decided that it was competent for the defendant to show, in his defence, that the charter was vacated by the non-user.

Mr. R. J. Brent, for the defendant, prayed the Court to instruct the jury, that if they should believe from the evidence that the board of examiners, acting at the time of the alleged offence, was not elected upon the first Monday of January, 1836; or if, for the last several years the said Board has been annually elected, and not constituted by filling vacancies in the same from time to time, as they occurred; or if the times and places for the meeting of the said acting board, were not fixed by the said supposed society, or if the acting president, secretary, and treasurer, or either of them, were not elected upon the first Monday of January, 1836, then the said board of examiners were not authorized (*de jure*) by law to grant licenses, and the traverser is entitled to a verdict of acquittal.

And also, if the jury should find from the evidence, that the officers of the supposed medical society, were not elected by seven members present on the first Monday of January, 1836, as directed by the charter, the said medical society was not in operation, and the defendant is entitled to a verdict of acquittal.

And also, if the jury believe from the evidence that from the date of the charter up to the year 1834, there was no medical board elected by at least seven members of the said society, then the right to elect the said medical board, no longer existed in law, and all subsequent elections of said board were illegal and void; and, by consequence, could not authorize them to grant licenses, and the defendant is therefore entitled to a verdict.

And also, if the jury believe from the evidence that the election of the different officers of the medical society was not made by at least seven members present, as directed by the charter, on the second Monday of March, 1819, and on the annual meeting in January, from that time to the first Monday of January, 1836, inclusive, then the defendant is entitled to a verdict of acquittal, also, if the jury believe that a resolution was passed by the said supposed society, to pay the debts of the said society, and to divide the funds; and that a division of said funds actually took place, and that for several years there were no operations whatsoever of the said society; and that members of the said society declared they had abandoned it, and considered it dissolved, then the jury may presume a surrender of the said charter, and the defendant is entitled to a verdict of acquittal.

Mr. Brent contended that by the neglect to choose its officers annually, the society is extinct *de jure*. 2 Kent's Com. 295.

The case of the Corporation of Banbury, 10 Mod. 346; *The King v. Pasmore*, 3 T. R. 238; Stat. 11 G. 1, c. 4.

The old officers could not hold over after the year. If it were a principle of the common law that they could, the statute of 11 G. 1, c. 4, would not have been necessary. *State v. Wayman*, 2 Gill & Johns. 278; *Phillips v. Wickam*, 1 Paige, Chanc. Rep. 590, confirms 10 Mod. 346; *The King v. The Mayor and Burgesses of Tregenny*, 8 Mod. 127.

That there was no board of examiners *de jure*. The board was not, by the charter, to be chosen annually, but to be kept alive by filling vacancies as often as they should occur. See the 7th section of the charter. See also *Foote v. Prowse*, Mayor of Truro, 1 Str. 625; *Hall v. Gough*, 1 Har. & Johns, 122; *Bank of Michigan v. Williams*, 5 Wendell, 478; *The King v. Hughes*, 4 B. & C. 368, 377, 378; *Symmers v. Regem*, Cowp. 507; *Rex v. Mein*, 3 T. R. 598; *Rex v. Hebden*, 2 Str. 1109; S. C. Andr. 388; *Rex v. Grimes*, 5 Burr. 2601; *Rex v. Peacock*, 4 T. R. 686, per Ashhurst, J.; *Anon.* 1 Barnard, 345; and Angell & Ames on Corp. 76, 77.

That it was incumbent on the society to fix the times and places for the meetings of the board of examiners, and to fill up vacancies in the board.

That there is no evidence of a *user* of the corporate rights until 1834; no minutes of their proceedings; no lawful president to sign the licences; no notice of meetings; but there is evidence of their breach of trust in dividing among the individual members the corporate funds, which by the charter they were to apply exclusively to the promotion of medical and surgical knowledge. They are bound to show their authority, and must be strictly confined to their charter. 2 Kent, Com. 299.

Mr. John R. Key, contra. Now, user or mis-user is not a dissolution of the corporation. It can only be dissolved by a proceeding against the corporation itself. 2 Kent, Com. 312; 1 Bl. Com. 485; Bac. Ab. Corp. 3. Even a forfeiture is not a dissolution until a judgment is pronounced, and all its acts, up to that time are valid. And the judgment must be upon a *scire facias*, or a *quo warranto*. The dissolution of a corporation can not be inquired into and ascertained collaterally in a suit against others. *United States v. Amedy*, 10 Wheat. 392; Bac. Ab. Corp. F. or G.

THRUSTON, J., and MORSELL, J., being of opinion against *Mr. Key* on that point, he said he would abandon it. But he contended that the corporation was, in fact, still in existence *de jure* and *de facto*, until a judgment against it. 2 Kent, 310; *Slee v. Bloom*, 19 Johns. 456; *Rockville Turnpike Company v. Van Ness*,

in this Court, (2 Cranch, C. C. 449); *Mechanics' Bank v. Minor*, also in this Court, *ante*. As to annual election of officers, *Mr. Key* cited 2 Kent, 295.

The Court neither refused nor granted the instructions prayed by *Mr. Brent*, but, (CRANCH, C. J., *contra*,) instructed the jury, that if they should be of opinion from the evidence, that at the time when, &c., there was no board of examiners *de jure*, the defendant is not guilty under the statute, and that if they should be satisfied by the evidence, that the board was not elected and continued by filling up vacancies, &c., but was, for the last two or three years, elected annually, &c., then there was no legal board of examiners, &c.

MORSELL, J., expressed an opinion that the prosecution was not sustained. That the indictment ought to have averred that there was such a corporation; that the board of examiners was appointed by at least seven of the members; and that the United States must show that the officers were duly appointed; and that although the minutes of the proceedings of the board were lost, yet the United States must prove their contents; and must show that, at the time when, &c., there was a competent board of examiners *de jure*. And that "if the jury find from the evidence that the election of the board of examiners was by a less number than seven members of said association; that then there was a neglect to elect an integral part of said corporation, and that it was thereby entirely incapable of performing the principal purpose for which the charter was granted, that they could not so restore their power as to make any subsequent legal election of said board of examiners; and that even if it amounts not to a forfeiture, yet by a consequence of law, said corporation is dead; and that if such was the state of this (society) at the time of the offence committed, as charged in the indictment, then they ought to find the traverser not guilty."

He said also that he was willing to give the jury the following instruction: "If the jury believe from the evidence that the medical association omitted intentionally to elect the president, vice-president, secretary, and treasurer of the said society for several years after the organization of the society, at the times directed by the charter, and neglected to fill up the vacancies which occurred in the said medical board; and that one or more of the members of the said association withdrew themselves therefrom, declaring that they considered the said corporation as dissolved; and, further, that the said association determined, by resolve of the board, to divide the property and effects of the said society among the individual members thereof; that then the jury may find that there was a surrender of the corpo-

Brent v. Hagner.

rate franchises and privileges of said society, and that the said corporation was dissolved. And if the foregoing state of things existed, at the time charged in the said indictments when the offence was committed, they ought to find the traverser not guilty."

In this opinion, THRUSTON, J., seemed to acquiesce, and added that in his opinion the society, by its charter, was only authorized to license students, and those who were about to commence the practice, not those already in the practice.

In consequence of this opinion of the Court, *Mr. John R. Key*, in opening his argument to the jury upon the evidence, said he should abandon the prosecution for practising without license, but not on the ground of defect of evidence. The jury after being out two days and one night, returned with a verdict of acquittal upon all the indictments.

W. L. BRENT v. PETER HAGNER.

Papers which have been filed in the proper accounting office of the treasury of the United States, as vouchers or documents to justify the settlement of a public account, are not liable to be taken from the public officer by replevin.

REPLEVIN for "a memorial of Caroline and Robert Brooke, the heirs of Michael Fenwick, deceased, of Saint Mary's county, Maryland, to the Congress of the United States, asking payment for certain buildings occupied by the American troops, and destroyed by the British during the last war, signed by said Brent, as attorney of the memorialists; and also sundry depositions and evidences accompanying said memorial, and other depositions, evidences, and papers laid before a certain Peter Hagner, by said Brent, to obtain payment of said claim, the proper goods and chattels of him the said William L. Brent, which the said Peter Hagner, of the county aforesaid, hath taken and unjustly detains," &c.

The writ was tested on the 30th of November, 1836, during the present term, and was issued on the 1st of December, 1836, returnable to the next term, (March, 1837.)

Mr. Key, for the defendant, moved the Court to quash the writ, and to order the papers to be returned.

The marshal brought the writ into court, indorsed, "replevied and delivered as per schedule and receipt. Alexander Hunter, marshal." The schedule is in the words of the writ, and the papers are appraised at \$50. The plaintiff's receipt for the same, was also indorsed upon the writ.

Brent v. Hagner.

Mr Key's motion was supported by the following affidavit of Mr. Hagner: "District of Columbia, county of Washington, ss. Personally appeared before me, Robert Gelty, an acting justice of the peace, in and for the county aforesaid, Peter Hagner, Third Auditor of the Treasury Department, and, having been duly sworn, deposeth and saith, That in support of the claim of the legal representatives of Michael Fenwick, deceased, for whose relief an act was passed at the last session of Congress, sundry papers were transmitted to this deponent, in June last, by William L. Brent, Esq., who, by certain of them, appeared to be the administrator of the estate of the said Michael Fenwick, and trustee of Robert Brooke, and S. A. Caroline, his wife, formerly S. A. Caroline Fenwick, the only child and heir of the said Michael Fenwick. That on the 2d day of July last, the claim, so far as regards the provision made by the first section of the said act, was passed by the accounting officers of the Treasury; when a requisition for the sum of \$5,000 thereby authorized to be paid, was delivered to the said William L. Brent; and the papers were placed on the files of the office of this deponent, for preservation, agreeably to the Act of the 3d of March, 1817, by which it was established: That to obtain a further allowance under the second section of the first-mentioned act, certain other papers were, at subsequent periods, furnished to this deponent by the said William L. Brent, but the testimony therein not being satisfactory, it was objected to by this deponent, and other required, which has not been supplied. That an application was made to this deponent by the said William L. Brent for permission to withdraw the papers, or to be furnished with a copy of all the evidence, so that he might lay the claim before Congress, and use as he thought proper, in any other way; that in reply thereto, he was informed by this deponent, that the rules of the office would not allow of the papers being withdrawn; that no copies would be necessary for Congress, as the originals could all be transmitted there, on the application of the committee to whom the case might be referred; and that if he desired copies for any other purpose, they could be taken by any person he might send for the purpose. That on the first day of the present month, the said William L. Brent called at the office of this deponent, and requested to look at the papers, and whilst the same were in his hands, the deputy-marshal made his appearance, and under a writ of replevin took, not only the testimony adduced under the second section of the first-mentioned act, but all the other papers previously transmitted, whereon the act was passed, and the \$5,000 paid, (with the exception of the official statement prepared in order to the payment

of that sum); the appointment of the said William L. Brent as administrator; the copies of two deeds of trust to him; a deposition proving Mrs. Brookes to be the only child and heir of Michael Fenwick; a certified copy of the bill before it became a law; and two letters addressed to this deponent by the said William L. Brent. That the paper hereunto annexed, marked A is a true copy of the notice, list, and receipt left with this deponent by the said deputy-marshal after having replevied the papers as aforesaid; and that deponent considers all the papers so replevied, which are connected with the before-mentioned payment of \$5,000, as properly belonging to the files of his office. ROBERT GETTYS, J. P., December 19, 1836."

Mr. R. J. Brent, for the plaintiff, cited the case of *Marbury v. Madison*, (1 Cranch, 129,) to show that the officers of the government are liable to ordinary process, if they invade the vested rights of individuals; and he contended that detinue would not lie because the papers could not be valued.

Mr. Key, contra, contended that they were now public documents, and if such can be replevied at the will of every individual who may choose to claim them, the public documents would not be safe.

The COURT (*nem. con.*) was of opinion that the writ of replevin ought to be quashed, and the papers returned; and made an order accordingly.

UNITED STATES v. HENRY H. WHITE.

Arson is not a capital offence in the District of Columbia, and therefore the defendant is not entitled to a peremptory challenge, in the county of Washington.

When the defendant, in a criminal prosecution, has offered himself ready, and pressed for trial in the county of Washington, the Court will not afterwards, when the cause is called for trial, change the *venue* upon the motion and affidavit of the defendant, suggesting that a fair and impartial trial cannot be had in the county of Washington. Under such circumstances it is a motion to the discretion of the Court.

In an indictment for burning the treasury building of the United States, the prosecutor was not permitted to prove that another person than the defendant confessed that he burnt it, in order thus to prove that the fire was not accidental.

In misdemeanors there are no accessories; all are principals.

In misdemeanors the limitation is two years.

If a statute punishes that, as a misdemeanor, which, at common law, was a felony, the limitation of a prosecution, under that statute, is that of misdemeanor, and not that of felony.

The limitation is applicable to misdemeanors created by statute subsequent to the act of limitation.

The defendant is not entitled to the benefit of the limitation, if within the two years he left any place, or concealed himself, to avoid detection or punishment for any offence; but it is not necessary that the United States should have known that he was the offender.

A party, in cross-examining a witness, has not a right to ask him any question tending to degrade him, unless it be in relation to a fact in issue in the record.

United States v. White.

It is not sufficient ground of arrest of judgment, that it appears, upon the face of the indictment and the record, that the indictment was not found within the time of limitation.

It is not universally true that what would be fatal upon demurrer would be equally fatal in arrest of judgment. Upon demurrer the Court decides upon the whole record as it then appears; but upon a motion in arrest of judgment the Court decides upon the whole record as it then appears.

There may be a *prima facie* cause of demurrer which may be removed by the subsequent pleadings.

Where the pleadings, in a criminal cause, are *ore tenus*, the judgment of the Court must be the same as if they were in writing, and spread upon the record.

After a general verdict, the Court is bound to presume that the parties respectively availed themselves of their rights, and that every thing was alleged and proved which they had a right to allege and could prove under that issue.

Limitation may be given in evidence by the defendant under the general issue in a criminal cause; and the United States may give in evidence the fact that the defendant fled from justice, and therefore was not entitled to the benefit of the limitation.

The Court, upon a motion in arrest of judgment, is bound to presume that every thing which was necessary to support the verdict, and which could be proved under the issue, was proved to the satisfaction of the jury.

INDICTMENT for burning the treasury building of the United States.

The first count charged that the defendant, on the 30th of March, 1833, "with force and arms, at the county aforesaid, a certain public building called the treasury office of the United States, situate in the city of Washington, in the county and district aforesaid, one of the cities of the District of Columbia, being one of the public buildings in the said city of said district, belonging to the United States, did maliciously and wilfully burn, against the form of the statute, in such case made and provided, and against the peace and government of the United States."

The second count charged that the defendant, "on the day and year aforesaid, at the county aforesaid, with force and arms, on the night of the said day, a certain house, called the treasury office of the United States, in which certain persons and the clerks and watchmen in the employment of the United States, did reside and lodge, belonging to the United States, situate in the said county and district, feloniously, wilfully, and maliciously did set fire to, and burn, and consume, against the peace and government of the United States."

The third count is in these words: "And so the jurors aforesaid, upon their oath aforesaid, further present that the said Henry H. White, on the day and year aforesaid, at the county aforesaid, with force and arms, on the site of a certain needful building belonging to the United States, being the treasury office of the United States, the site whereof was ceded to the United States, and under their jurisdiction, being in the county and district aforesaid, a certain dwelling-house, wilfully and ma-

liciously did burn, against the form of the statute in such case made and provided, and against the peace and government of the United States."

By the third section of the Act of Congress of the 2d of March, 1831, [4 Stat. at Large, 448,] entitled "An act for the punishment of crimes in the District of Columbia," it is enacted,

"That every person duly convicted of the crime of maliciously, wilfully, and fraudulently burning any dwelling-house, or any other house, barn, or stable adjoining thereto, or any store, barn, or outhouse having goods, tobacco, hay, or grain therein, although the same shall not be adjoining to any dwelling-house; or of maliciously and wilfully burning any of the public buildings, in the cities, towns, or counties of the District of Columbia, belonging to the United States, or the said cities, towns, or counties," &c., "or as being accessory thereto, shall be sentenced to suffer imprisonment and labor, for a period of not less than one, nor more than ten years, for the first offence," &c.

By the Act of Congress of the 3d of March, 1825, c. 65, [4 Stat. at Large, 115,] entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," section 1, it is enacted,

"That if any person or persons within any fort, dockyard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to and under the jurisdiction of the United States; or on the site of any light-house or other needful building belonging to the United States, the site whereof is ceded to them and under their jurisdiction as aforesaid, shall wilfully and maliciously burn any dwelling-house, or mansion-house, or any store, barn, stable, or other building, parcel of any dwelling-house, or mansion-house, every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, suffer death."

And by the second section it is enacted,

"That if any person or persons, in any of the places aforesaid, shall wilfully and maliciously set fire to or burn any arsenal," &c., "or any other building not mentioned in the first section of this act, or any ship or vessel," &c. &c., "every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence."

The first count is under the Act of Congress of the 2d of March, 1831, usually called the Penitentiary Act.

The second and third counts seem to have been framed under

the first and second sections of the Act of the 3d of March, 1825, c. 67.

Mr. W. L. Brent, upon the affidavit of the defendant "that a fair and impartial trial cannot be had in Washington county," moved the Court to transfer the cause to the county of Alexandria for trial.

Mr. F. S. Key, for the United States, objected that the defendant about a week ago offered himself ready, and pressed for a trial, but as the case of Richard H. White, for the same offence, stood before it upon the docket, and this defendant refused to be tried at the same time, the Court then ordered the jury to be sworn in Richard H. White's case, which has occupied the whole of the intermediate time. The witnesses are all here. The jury in Richard's case have not yet returned a verdict. It is an application to the discretion of the Court.

Mr. Brent, in reply, suggested that the trial of Richard White had prejudiced the public mind.

The COURT (*nem. con.*) refused to change the *venue*.

Mr. Brent then moved for a continuance of the cause to the next term, upon affidavit of the defendant that he did not know that Knott would be a witness; and that he would swear that he saw Richard H. White in Washington on the morning after the fire. The affidavit further stated that he could prove by the landlady of a tavern between Rossburgh and Baltimore that the defendant was in her house about eight o'clock of the morning of the fire; and by the keeper of a tavern in Baltimore that he arrived there in the forenoon, and staid there till Tuesday morning.

The COURT (*nem. con.*) refused to continue the cause, as these witnesses were known to the defendant at the time of his arrest; and he had already summoned witnesses to prove an *alibi*, and the others could only corroborate.

Mr. Brent, in cross-examining Hicks, a witness, asked him whether he was arrested for counterfeiting money.

MORSELL, J., said he thought the question ought not to be put.

CRANCH, C. J., said he had some doubt upon that point.

THURSTON, J., said he should like to hear the authorities.

Mr. Brent cited Starkie, part 2, p. 138 to 145; Roscoe on Ev. 135; *Holding's case* at the Old Bailey in 1821.

Mr. Key, *contra*, cited Roscoe, 132, 140; *De Sailly v. Morgan*, 2 Esp. 691; *Watson's case*, in 2 Starkie's cases, 157; *Rose v. Blakemore*, Ry. & Mood. N. P. C. 384; *Lloyd v. Passingham*, 16 Ves. 64.

The COURT (*nem. con.*) was of opinion that the party has not

a right to ask of a witness, in cross-examination, any question tending to degrade him, (unless it be in relation to a fact in issue in the record. *Quære.*)

Mr. Brent, after the evidence on the part of the United States had been given, prayed the Court to instruct the jury that there was no evidence given to support the second and third counts; but

The COURT refused to give the instruction.

Mr. Key, for the United States, offered to prove by the witness, Hicks, that Richard H. White confessed that he burnt the treasury building, in order to prove that the building was burnt by design, and therefore that an offence had been committed; but

The COURT (*THRUSTON, J., contra*,) refused to suffer the evidence to be given.

The COURT having given, in this cause, the same instruction respecting principal and accessory, *Mr. Key* contended that it applied only to the common-law count, as the other two counts were for misdemeanors, in which all are principals.

Mr. Brent, contra, contended that, as the third section of the Penitentiary Act made a distinction between principal and accessories, even in cases of misdemeanor, the indictment should state in which character the defendant is charged.

MORSELL, J., said that in misdemeanors all are principals. The statute did not alter the nature of the offence; and accessories, in misdemeanor, must be indicted as principals.

CRANCH, C. J., said, such is the opinion of the Court. The third section of the Penitentiary Act enumerates several offences, some of which are felonies, to which there may be accessories; it was proper therefore, at the close of the enumeration, to say, that every person duly convicted of any of those offences, "or as being accessory thereto," shall be sentenced, &c. Those words are applicable only to those of the previously enumerated offences, to which there can, by law, be accessories.

THRUSTON, J., said that he was opposed to the instruction altogether, because there was no evidence that the defendant was not present at the burning.

Mr. J. R. Key, for the United States, contended that as to the second count, (which he considered as charging a capital offence at common law,) the limitation was three years.

The thirty-first section of the statute of April 30, 1790, relates to offences which were then capital, and if they had been enumerated in the section, instead of being referred to by a general description, arson would have been specifically named; and then

prosecutions for arson would be limited to three years, in whatever manner the offence might be afterwards punishable.

If it be not now a capital offence in this district, it is because its punishment has been changed by the penitentiary law for this district, either in the first, third, or fourteenth section. But the nature of the offence is not changed, nor the limitation of the time in which the offence may be prosecuted; for by the sixteenth section, "every matter not provided for" by that act is to remain as theretofore.

Mr. R. J. Brent, contra.

In *United States v. Mayo*, 1 Gall. 397, and 2 Cranch, 336, it is decided that the limitation of 1790, is applicable to offences created after that act, and therefore does not apply exclusively to crimes as they then existed. If an offence, then not capital, has been since declared to be capital, the limitation would now be three years.

As to two of the counts the question is not applicable, for they were only misdemeanors at common law, and the other count is not for arson.

When the defendant offered a peremptory challenge, the Court said that it was no longer a capital offence, and that therefore, a peremptory challenge could not be allowed.

Mr. Key, in reply, cited 8 Wheeler, 152; Statute, § 5; and *Ship Argo*, 1 Gall. 150.

The Court, (THRUSTON, J., doubting,) was of opinion that the limitation was two years only.

And in answer to a prayer made by the defendant's counsel, the Court instructed the jury that if they find, from the evidence, that no indictment was found against the defendant within two years from the time the offence was committed in this case, then the statute of limitations is a bar; unless they also find that the prisoner left this district, or any other place within the United States, for the purpose, or with the view to avoid detection or punishment for the offence of burning the treasury building, or for any other offence; or that he concealed himself in any other way, for said purpose, or to prevent detection at any time within the said two years.

CRANCH, C. J., stated that he concurred in this opinion as far as it went; but that it did not go far enough. He thought that if, at any time during the two years, the defendant went out of the United States, or from one place to another within the United States, or concealed himself to avoid arrest or detection for this or any other offence, the limitation did not run in his favor, unless afterwards within the two years, he appeared openly and notoriously, so that, with ordinary diligence,

he might have been arrested in the United States; and so continued for two years after such concealment, &c. or until his arrest.

THRUSTON, J., did not concur, for the reasons stated in his written opinion delivered at the trial of Richard H. White, (*ante*, 38.)

The COURT, (THRUSTON, J., *contra*,) was also of opinion, that it was not necessary, in order to the defendant's having the benefit of the limitation, that the United States should have known that he was the person who burnt the treasury building.

Verdict guilty.

Mr. R. J. Brent, moved in arrest of judgment, because the indictment states that the offence was committed on the 30th of March, 1833, and the record shows that the indictment was found on the 30th of March, 1836, so that it appears upon the record that the offence was committed more than two years before the indictment was found; and it does not appear by the record that the defendant was a person "fleeing from justice."

Mr. Brent referred to *Watkins's case*, in this Court at May term, 1829, (3 Cranch, C. C. 441,) where the Court decided that the objection was fatal upon demurrer. One of the objections in that case was, "That advantage of the limitation cannot be taken upon demurrer, because the United States would be thereby precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years. But the Court answered, "That, however, it may be in practice, yet in theory, and by law, if judgment upon demurrer to an indictment for a misdemeanor be given against the defendant, it is a peremptory judgment of condemnation; and although in practice the Court will often rather intimate its opinion, than pronounce sentence; and will permit the defendant to withdraw his demurrer, and plead to issue; yet upon the question whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the Court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the Court cannot deprive him of the benefit of it. We therefore think that the defendant has a right, upon demurrer, to avail himself of the statute of limitations. It has been said that the United States would be thereby precluded from replying the flight of the defendant, if such should have been the fact. But that is not the fault of the defendant. The United States have put themselves in that situation by stating the fact to have happened beyond the day of limitation. They were not bound so to

do, for they might have laid the day to have been within the time of limitation, and proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence, or they might have stated, in the indictment, the true time and any facts which existed, and went to show that the defendant could not avail himself of the limitation." The point, therefore, is already decided by this Court, that the objection is good on demurrer; and what is good on demurrer is good in arrest of judgment. 1 Chitty, 285, 442, 662; *Lee v. Clark*, 2 East, Rep. 333, and *Watkins's case*, Pamphlet Report, 134, in which this Court said that "upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer." It does not appear in the record that the defendant fled from justice, but it does appear upon the face of the record that the defendant had a legal defence, and, therefore, the Court cannot render judgment against the defendant. There is no allegation in the proceedings which will let in the evidence of the defendant's fleeing from justice. *Piatt v. Vattier*, 9 Peters, 415.

Mr. J. R. Key, and *Mr. F. S. Key*, for the United States, *contrè*.

The United States are not bound to show the day to be within the time of limitation. It is a matter of defence to be shown by the defendant. The doctrine in Chitty is only applicable to a statute which creates the offence, and directs that it shall be prosecuted in a certain time; not to a statute of limitations applicable to all misdemeanors. It relates to convictions on penal statutes, and summary proceedings in inferior jurisdictions. There is a difference between a demurrer and a motion in arrest of judgment, in this, that after verdict, it will be presumed that a day was proved within the time of limitations. The case in 9 Peters, only decides that in a case in equity, there must be allegations as well as proofs. But the defendant, on the trial claimed the benefit of the limitation, and the United States gave evidence that the defendant was a person fleeing from justice, and therefore had no right to claim that benefit; and the whole matter was submitted to the jury. All this will appear in the record, and the Court will decide upon the whole record. 1 Chitty, 284, 285; *Lee v. Clarke*, 2 East, Rep. 333; *Rex v. Bryan*, 2 Str. 1101; Archbold's Crim. Pl. 53.

Mr. Brent, in reply, cited *Rex v. Fisher*, 2 Str. 865.

CRANCH, C. J., delivered the opinion of the Court.

The indictment in this case (which was for burning the treasury building of the United States,) charged the offence to

have been committed on the 30th of March, 1833, and the indictment was not found until the 30th of March, 1836, so that more than two years appeared upon the record to have elapsed between the commission of the offence, and the finding of the indictment.

By the 31st section of the Act of Congress of the 30th of April, 1790, [1 Stat. at Large, 112,] it is enacted, that no person "shall be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under a penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid; provided that nothing herein contained shall extend to any person or persons fleeing from justice."

The defendant pleaded the general issue, and the jury found a general verdict against him.

The defendant, by his counsel has moved in arrest of judgment, upon the ground that it appears on the record that the indictment was not found within two years after the commission of the offence.

On the part of the defendant it was contended that when the time for the prosecution of an offence is limited, the time, as averred in the indictment, should appear to be within the limit. (1 Chitty, Cr. L. 223,) and this Court so decided in the case of *Doct. Watkins* in 1829, when they sustained a demurrer to the indictment against him, upon the transaction with Hambleton; and it was further contended that whatever objection would have been good on demurrer, is good upon a motion in arrest of judgment. 1 Chitty, 442.

I am not disposed to disturb the decision in *Watkins's case*. I think it was right. But there seems to be a great difference between a demurrer directly to the indictment, before any other pleadings have been had in the case, and a motion in arrest of judgment, after all the pleadings have been made up, issue joined and verdict thereupon. In the first case, the judgment must be upon the whole record as it then appears; and upon a motion in arrest of judgment after verdict, the judgment must be upon the whole record as it then appears. There may be a *prima facie* cause of demurrer to the indictment which may be removed by the subsequent pleadings. An indictment may, upon its face, state a fact which would be a good defence, and the defendant may in that stage of the cause, avail himself of it by demurrer; and if judgment should thereupon be rendered in his favor, and the indictment should be quashed, a new indictment may be sent up, omitting that fact, or stating other facts to show

that it is no defence for that defendant; but if, without then taking advantage of the error in the indictment, the defendant proceeds to plead the matter of defence, and the United States reply matter showing that the defendant is not in a condition to avail himself of that defence, and the defendant should demur to the replication, thereby admitting the facts stated in the replication to be true, the judgment upon that demurrer must be against the defendant, because the matter of the replication admitted by the demurrer, would show that the defendant was not in a condition to avail himself of the *prima facie* matter of defence contained in the indictment. And if, instead of demurring to the replication, the defendant should take issue upon it, and the verdict should be against him, and he should move in arrest of judgment, the same matter would appear to the Court. The whole record would be before them, and the motion in arrest must, upon that state of the record, be overruled.

This would be the result if the pleadings should be in writing and spread upon the record. But the judgment of the Court must be the same, where the pleadings are *ore tenus*. The Court is bound to take notice that the defendant, upon the plea of "not guilty" had a right to avail himself of the limitation of time if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefit; and after a general verdict the Court is bound to presume that the parties respectively availed themselves of their rights; and that every thing was alleged and proved which they had a right to allege, and could prove under that issue. If, from accident or ignorance of his rights, the defendant should have been prevented from asserting and using his right, it might be the ground of a motion for a new trial. But after a verdict upon the general issue, the Court is bound to presume that the jury had considered and acted upon every defence which the defendant could make under that issue, and upon every matter which either of the parties could lawfully have given in evidence upon the trial. As the verdict was against the defendant, and as the jury could not have found such a verdict, unless they had found that the defendant was a person fleeing from justice, the Court must presume that they were satisfied of that fact by the evidence. Thus, in the case of *Lee v. Clarke*, 2 East, Rep. 333, in error from the Court of Common Pleas, in an action of debt for a penalty given by the game-laws for using a certain engine to kill and destroy the game of the kingdom, not having lawful authority so to do, the declaration stated that the offence was committed "within the space of six calendar months, to wit, on the 21st of January, 1801, whereas the limitation by the statute of 2 G. 3,

c. 19, § 6, was six months, which, at common law, except in mercantile transactions, means six lunar months. Upon the plea of *nil debet* the verdict was for the plaintiff, and this matter among others, was assigned for error. A previous statute, (26 G. 2, c. 2,) had limited the time for prosecution to the end of the second term after the offence committed. Lord Ellenborough, during the argument said, "Notwithstanding the allegation that the offence was committed within six calendar months, &c., yet if it were not committed within the time prescribed by the statute, the plaintiff must have been nonsuited;" thereby admitting that the defendant might avail himself of the limitation of time upon the general issue; and that if the plaintiff had not proved the offence to have been committed within the time limited by the statute, he must have been nonsuited in that action of debt, and, of course, if it had been a criminal prosecution by indictment, the defendant must have been acquitted.

Lawrence, J., also said, "The time having elapsed would have been evidence for the defendant on the plea of *nil debet*. The argument goes the length of assuming that, if no time whatever had been alleged, it would have been sufficient for the plaintiff, at *nisi prius*, to have proved the offence committed at any time before the action commenced; which cannot be pretended."

The counsel for the defendant in error said, "But the answer already given by the court is sufficient; the allegation itself was unnecessary, and may be rejected; and after verdict the court will presume that the fact was proved within time."

After the argument was closed, Lord Ellenborough said, "To some of the errors assigned, an answer has already been given by the court; such as those which respect the allegation of the time within which the action was commenced being stated to be within six calendar, instead of lunar months, and not stated to be within two terms. The allegations were not material: and we cannot presume that the fact was not proved to have happened within the time prescribed by law for the commencement of the suit."

So in the case of *Pugh v. Robinson*, 1 T. R. 116, which was a case of special demurrer to the declaration, on the ground that it appeared, upon the record, that the suit was brought before the cause of action accrued, the court overruled the demurrer, because that fact did not appear upon the record.

Mr. Law, (afterwards Lord Ellenborough,) in support of the demurrer, said, "Though on motions in arrest of judgment, and on trials at *nisi prius*, the court will inquire when the bill was actually filed, yet they will not on demurrer, where such inquiry is precluded."

If this be the law, and it was an admission by eminent counsel, there is a difference between a demurrer and a motion in arrest of judgment.

Upon a demurrer, the inquiry respecting a fact not appearing on the record is precluded; but may be admitted upon a motion in arrest of judgment, in some cases. But it is not necessary, in the present case, to insist upon that difference in this respect; for, after a general verdict, the Court must presume that every thing in issue has been considered and decided by the jury; and every fact was in issue of which the parties could avail themselves upon the plea of "not guilty;" one of which facts was, on the part of the defendant, the limitation of time, and another of which facts was, on the part of the United States, the defendant's fleeing from justice.

In the above case of *Pugh v. Robinson*, the promise and breach (which were the cause of action,) were, in the declaration, alleged to be on the 7th of November, 1785, which was the first day of Michaelmas term. The declaration was entitled generally of that term. The defendant demurred specially, and contended that the filing must, in law, relate to the first day of the term, and as the law knows no fractions of a day, it must relate to the first instant of that day. On the other side it was contended that the term, for the purpose of delivering the declaration, could not be considered as commencing until the sitting of the court. That this was evident on adverting to the ancient practice of the court when the parties declared *ore tenus*, which was minuted by the prothonotary; but, on account of the great increase of business, the present mode of delivering the declaration in writing, was substituted. That, therefore, this declaration could not be supposed to have been delivered before the sitting of the court; for, till that time, by the old practice, the party could not have declared *ore tenus*; and although the law does not, in general, allow fractions of a day, yet the court will take notice of their usual time of sitting, before which time the contract might have been made and broken, and the declaration be thus supported.

Ashhurst, J., said: "The court ought to make any intendment against a mere captious objection. We must resort to the old practice of declaring *ore tenus*; and by referring to that we find that the declaration could not have been delivered till the sitting of the court, so that here the promise and the breach may well have taken place before the delivery of the declaration."

On that ground the demurrer was overruled.

Here, then, it is clear that the Court may explain the record

by reference to the ancient practice of pleading *ore tenus*, even in cases of demurrer; and, *à fortiori*, in cases of motion in arrest of judgment.

Weston v. Mason, 3 Burr. 1725, is a strong case to show that there is a difference between a demurrer and a motion in arrest of judgment. It was an action of debt upon a bond, brought against the sureties of a sheriff's bailiff. The condition, after reciting that the sheriff had appointed the person bailiff for the Hundred of East Gotson, was that, "if, therefore, he shall duly execute his office, &c., within that hundred, and shall duly execute all warrants directed to him, and make due and sufficient return thereof, &c., then the bond to be void." Performance of the condition was pleaded. The plaintiff replied that the bailiff had not made a due return to a particular warrant directed to him. The defendant rejoined that he had; upon which issue was joined, and verdict for the plaintiff.

Mr. Dunning moved in arrest of judgment, and contended that the breach assigned was not sufficient, because it did not state that the warrant was directed to the bailiff, as bailiff of that hundred, and therefore he was not obliged to return it. He cited the case of *Stoughton v. Day*, Aleyn, 10, and contended that it was exactly like this, except that that was a warrant on an execution, and this on mesne process; that the condition of that bond was in the very words of this; and that upon looking into the record of that case it agreed with the present.

Sir Fletcher Norton and Mr. Ashhurst said that "that case was on demurrer—this after verdict; therefore it shall be supposed that every thing necessary to maintain the action was proved."

Lord Mansfield said: "A case is cited out of Aleyn, as in point; but the case out of Aleyn was upon demurrer. If it stood upon the construction of the bond, I should have desired to consider of it; but this being in arrest of judgment, after verdict, and not on demurrer, it does not appear that it was directed to him as bailiff of the hundred."

Mr. Justice Wilmot: "If it had stood upon a demurrer I should have thought the case in Aleyn to have been in point." "But upon this record we cannot take the warrant to be directed to him otherwise than as bailiff of the hundred; and by joining issue on the fact of returning it, he admits that it was not directed to him generally. And since he has admitted the execution of it, we cannot intend that it was not directed to him as bailiff of the hundred, in order to arrest a judgment."

Mr. Justice Yates: "The case in Aleyn was determined on a demurrer. Therefore that case does not affect this."

Mr. Justice Aston concurred, and the judgment was not arrested.

Here, then, is a case where, if the defendant had demurred to the replication, the judgment would have been in his favor; but as he pleaded over, and took no exception until after verdict against him, the judgment could not be arrested, although the replication was still as defective after verdict as it was before. And the reason is, that after verdict, every thing which the plaintiff could have proved, under the issue, in support of the verdict, must be presumed to have been proved. This is evidently the spirit and reason of the case.

In the case of *Henry H. White*, now before us, the parties had clearly a right, under the general issue, to litigate the question of limitation of time. The defendant had a right to rely on the statute; and the United States had a right to show that the defendant was a "person fleeing from justice," and therefore not entitled to the benefit of the limitation. 1 Chitty, 470, 475, 626. All this must, or might, have been before the jury; and as they found a general verdict against the defendant, the Court is bound to presume that every thing which was necessary to support the verdict, and which could be proved under the issue, was proved to their satisfaction. There can be no doubt that the United States, upon the issue of not guilty, might have given evidence to show that the defendant was a person fleeing from justice; and if that fact was proved, it entirely removed the ground of demurrer which originally existed in the indictment, namely, that the indictment was not found within two years after the offence was committed; and as the Court is now bound to presume, from the verdict, that the fact of the defendant's fleeing from justice was fully proved, there can no longer be a pretence for arresting the judgment upon that ground.

A defendant who is permitted to avail himself of the benefit of the statute of limitations upon the general issue, in a criminal cause, ought not, thereby, to be placed in a better condition than if he had pleaded it specially. If he had so pleaded it, the facts would have been spread upon the record to show that he was not entitled to its benefit; and then upon the whole record the judgment could not be arrested. If he chooses to rely upon the statute, without pleading it, he must take it with all its burdens, and liable to all its provisos and exceptions. He cannot be permitted to have the full benefit of the statute, upon the general issue, and when the verdict is against him, arrest the judgment, because he had not pleaded it specially.

The defendant's counsel seemed to rely much upon the dicta of the Supreme Court of the United States in the case of *Piatt*

United States v. Negro Herbert.

v. *Vattier*, 9 Peters, 415. But those dicta are only a confirmation of the general maxim in courts of equity that the decree must be *secundum allegata et probata*. In those courts, proofs without allegations are quite as unavailable as allegations without proofs. But in a criminal case the defendant is permitted to prove, upon the general issue, matter of defence not specially alleged, and the United States to rebut the same by evidence, without any written special replication. It is a question of practice rather than of law, and the difference of jurisdiction causes a difference in practice.

Upon the whole I am clearly of opinion that, in the present state of the record, the judgment cannot be arrested for the cause assigned.

THRUSTON, J., concurred.

MORSELL, J., dissented.

The motion in arrest of judgment was overruled, and the defendant sentenced to seven years imprisonment and labor in the penitentiary.

 UNITED STATES v. NEGRO JAMES HERBERT.

An indictment for assault and battery at common law, and an indictment under the statute for the same assault and battery with intent to kill, may be pending and tried at the same time, and if the defendant be found guilty on both, the attorney for the United States may enter a *nolle prosequi* as to either, and pray judgment upon the other; but there cannot be judgment upon both. The pendency of another indictment against the defendant for the same offence is no ground for arresting the judgment.

In an indictment under the statute for assault and battery with intent to kill, it is not necessary to state the manner and extent of the assault and battery, nor the particular weapon used. It is only necessary to describe the assault and battery as at common law, with the addition of the words charging the intent to kill in the terms required by the statute. It is not necessary to charge the assault to be felonious, nor malicious, nor to be with malice prepense, nor to state any other circumstance to show that, if death had ensued, it would have been murder.

A former conviction cannot be pleaded in bar unless it has been followed by judgment.

THERE were two indictments against the defendant. The first (No. 176,) was for a simple assault and battery at common law upon one John Sybert. The other for the same assault and battery, in the same words, with this addition, "with intent him the said John then and there to kill," "and against the form of the statute in such case provided."

The two indictments were found on the same day, and tried on the same day, and the defendant was found guilty on both, whereupon *Mr. Key*, the attorney for the United States, entered a *nolle prosequi*, with the leave of the Court, upon the indict-

ment for simple assault and battery, and moved the Court for judgment upon the other.

Mr. H. May, and *Mr. C. L. Jones*, for the defendant, moved in arrest of judgment, and for a new trial. For the motion in arrest of judgment three reasons were assigned.

1st. Because the defendant is "convict of the same identical offence on another indictment found and prosecuted at the same time, and for the same identical offence, differing in no respect but in matter of mere aggravation.

2d. Because the indictment is vague, uncertain, and insufficient; especially in this, that the manner and degree of the assault charged is not shown; no deadly or dangerous weapon or instrument, nor any weapon or instrument of any kind, is described, or in any manner averred or shown to have been used or exhibited in the assault, or in any manner to have accompanied it; nor is it in any manner averred or shown that killing or murder might have ensued from the assault, or how or by what means the alleged intent to kill was attempted to be carried into effect.

3d. Because the indictment does not "charge the assault to have been felonious or malicious: nor in any manner avers or infers that the killing charged as intended by the prisoner would have been a felonious or malicious homicide, in any degree, if it had been perpetrated."

The reasons stated for granting a new trial were, 1. Because, as to the intent to kill, the verdict was contrary to the evidence; 1st, in this, that there was no evidence of malice prepense, or any other matter going to constitute the offence of murder if death had ensued from the assault; 2d, in this, that there was no evidence of an intent to kill.

2. Because the defendant stands convict, upon another distinct indictment, for the same identical offence, and upon the same, and no other evidence, of a simple assault and battery, without the aggravation of the intent to kill; upon which conviction he now stands for judgment, which, as he has nothing to say against it, must of necessity be passed in due course.

3. The third reason, in effect, was that if the motion in arrest of judgment is not the proper mode to take advantage of the double conviction, and if a motion to quash the indictment on that ground be too late, the defendant ought to have a new trial, with leave to plead that matter in bar.

4. Because new evidence has been disclosed to the defendant since the jury was sworn, and not known to the defendant in time to obtain it at the trial.

The defendant's counsel cited *Tidd*, 464; *Com. Dig. Indict-*

ment, G. & N. note; 2 Starkie, 200; Starkie, Crim. Pl. 378; 6 Wheeler, 33; Archbold's Crim. L. 348, 349.

CRANCH, C. J., delivered the opinion of the Court.

This is an indictment for assault and battery with intent to kill one John Sybert.

The defendant's counsel have moved in arrest of judgment,

1. Because there was pending at the same time another indictment, charging it as a simple assault and battery at common law, both indictments having been found at the same time, and tried at the same time, by the same jury, who found the defendant guilty upon both, at the same time.

These facts do not appear in the record of the case, in which the defendant was found guilty of a battery with intent to kill; and therefore are no ground for arresting the judgment.

If, as the defendant's counsel contend, the defendant had a right, upon the general issue, to avail himself of the pendency of another indictment for the same cause of prosecution, it is to be presumed, after a general verdict against the defendant, that the jury acted upon and negatived that defence; for the Court must presume that they considered every defence which the defendant could avail himself of, under that issue.

2. The second ground alleged for arresting the judgment is, that the indictment is "vague, uncertain, and insufficient; especially in this, that the manner and degree of the assault charged is not shown. No deadly or dangerous weapon or instrument is described, or averred, or shown to have been used or exhibited in the assault," &c. "nor is it in any manner averred or shown that killing or murder might have ensued from the assault, or how, or by what means the alleged attempt to kill was attempted to be carried into effect."

In the argument of the defendant's counsel, it was contended that the indictment should so far have discriminated the nature, degree, and circumstances of the assault and battery as to show the Court with legal certainty that it was commensurate with the imputed intent, and was *per se*, if proved as laid, sufficient to ground a presumption of the intent from the act itself.

The Penitentiary Act, upon which this indictment was framed, only requires that the offence charged should be an assault and battery with intent to kill. To describe the offence as it is described at the common law, with the addition of words charging the intent to kill, seems to be all that is necessary in an indictment upon the statute, especially as the sixteenth section of the same statute declares, that all definitions and descriptions of crimes, not provided for in the acts, should remain as heretofore. When, therefore, the statute uses the common-law terms "as-

sault and battery," the description of that part of the offence which consists of the assault and battery must be the same as heretofore, that is, at common law; and although in the old indictments for assault and battery it was usual to say, with sticks, staves, knives, &c., yet it has been often decided that the particular instrument used need not be proved, as laid in an indictment for assault and battery at common law. We think the indictment is sufficient, under the statute, if it describe the common-law offence, with the addition of the words required by the statute. The precedent referred to in Archbold's Crim. Law, 348, is an indictment at common law for an aggravated assault and battery, describing particularly the manner of beating, namely, by throwing the person down upon a brick floor, and beating and kicking him, &c.; but it cannot be contended that those circumstances might not have been given in evidence upon a common count for assault and battery.

The other precedent, cited from p. 349, is upon the statute of 9 Geo. 4, c. 31, § 11, which enacts that if any person shall unlawfully and maliciously attempt to drown any person, with intent to murder such person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death. Archbold's Cr. L., Appendix, 76. The precedent cited states that the defendant feloniously, unlawfully, and maliciously, did cast, throw, and push the said J. N. into a certain pond there situate, wherein was a great quantity of water, and did then and there feloniously, unlawfully, and maliciously attempt the said J. N. to drown and suffocate, with intent, then and there, and thereby, feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder, against the form of the statute, &c.

This precedent contains no averments not required by the statute in order to make a case under it. By the same section of the same statute, it is enacted "that if any person unlawfully and maliciously shall administer, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person; or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony; and, being convicted thereof, shall suffer death as a felon."

The indictment in p. 349, for attempting to shoot, with intent,

&c., states it to be by drawing a trigger of a certain pistol loaded with gunpowder and one leaden bullet, which pistol the defendant had and held in his right hand.

The indictment in p. 351, for stabbing, with intent, &c., only states that the defendant, in and upon the right side of the belly of him the said J. N., between the short ribs of him the said J. N., feloniously, unlawfully, and maliciously, did stab, cut, and wound, with intent, &c.

And Archbold says, "the instrument or means by which the wound was inflicted need not be stated; and, if stated, do not confine the prosecutor to prove a wound by such means. It is not necessary that the prosecutor should be cut in a vital part, for the question is not what the wound is, but what wound was intended."

The indictment in p. 351, under the 12th section of the same statute, for stabbing, &c., with intent to maim, &c., is in the same form. And Archbold says the instrument need not be stated; and if stated need not be proved.

The indictment in p. 357, under the 25th section of the same statute, for an assault and battery with intent to commit felony, and which punishes the offence by imprisonment and hard labor not exceeding two years, or by fine and imprisonment and surety of the peace, is quite as bare of circumstances as the present. It merely states that the defendant, in the county aforesaid, in and upon one J. N., in the peace of God, &c., then and there being, unlawfully did make an assault, and him the said J. N. did then and there beat, wound, and ill-treat, with intent, &c. Add (says Archbold,) a count for a common assault and battery.

From a consideration of all these forms of indictment, we are satisfied that the form of the present indictment is sufficient; and that the manner of the assault and battery need not be more circumstantially stated therein than it is.

3. The third reason alleged for arresting the judgment is, because the indictment does not charge the assault to have been felonious or malicious; nor aver, nor infer, that the killing charged as intended by the defendant would have been a felonious or malicious homicide in any degree, if it had been perpetrated.

The statute does not require that the assault should have been felonious, or malicious; nor that the homicide, if it had been perpetrated, would have been felonious or malicious. The intent to kill gives to the assault and battery its whole statutory character. It is sufficient to charge the assault and battery in the usual form, and that it was made with that intent.

The defendant, by his counsel, has also moved for a new trial. 1. Because the verdict, as to the intent to kill, was contrary to evidence; 1st, in this, that there was no evidence of malice prepense, or other matter going to constitute the offence of murder, if death had ensued; and 2dly, in this, that there was no evidence of the intent to kill or murder.

The answer to this objection to the verdict is, that there was evidence, tending to prove the intent to kill, sufficient to be left to the jury, who had the whole subject before them; and that the issue did not require evidence of malice prepense, nor of any other matter, to show that the offence would have amounted to murder if death had ensued.

2. The second ground urged for a new trial is, that the prisoner stands convict upon another distinct indictment for the same identical offence, and upon the same identical and no other evidence, of a simple assault and battery, without the aggravation of an intent to kill.

The answer to this is, that upon the common-law indictment for simple assault and battery, the Attorney for the United States has entered a *nolle prosequi*, so that no judgment can be entered upon the verdict in that case; and a former conviction cannot be pleaded in bar unless it has been followed by judgment; nor can the pendency of another indictment for the same offence be pleaded in bar or abatement, though it may be a good ground for a motion to quash. 1 Chitty, Cr. Law, 446, 447; Foster's Cr. Law, 104; 1 Chitty, 299, 301, 303, 452, 454, 455, 456, 457, 462; 2 Hale, 243, 246. All that the defendant could ask in any previous stage of these prosecutions, was, that the Attorney of the United States should select which of them he would try. The defendant having pleaded to both indictments, and the trial of both, by the consent of the defendant, having been had before the same jury, and verdicts against him having been rendered upon both indictments, the Attorney of the United States had the option to take judgment upon that which would "best answer the ends of public justice;" the Court taking care that judgment should not be entered up on both. *Swann v. Jeffreys*, Foster's Cr. Law, 106.

3. The third ground urged for a new trial supposes that there may be judgments at the same time upon both indictments. This cannot now be, as a *nolle prosequi* is entered upon one of them.

I am not certain that two separate indictments were necessary, as both are for misdemeanor. In one the punishment is fine and imprisonment; and in the other, imprisonment and labor; and in neither is the defendant entitled to a peremptory chal-

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lenge. But the grand jury having found separate indictments, they must be disposed of; and if the Court should at any time be satisfied that indictments are multiplied vexatiously and unnecessarily, and with a view to oppress the defendant, the remedy must be by quashing them, or some of them. Archbold, Cr. Law, 60; *Young v. The King*, 3 T. R. 106; *Rex v. Benfield*, 2 Burr. 984.

4. The fourth reason assigned for a new trial is the discovery of evidence supposed to be material for the defendant, after the jury was sworn, when it was too late to be adduced in his defence.

The affidavit in support of this allegation states, that if a new trial should be granted, the defendant expects to prove, by evidence not known to him in time to be adduced in his defence, that John Sybert, upon whom the assault and battery is alleged to have been made, had a dirk or knife about his person at the time of the assault, and that it was taken from him by the witness.

It does not seem to us that that fact is material; for unless the defendant could show that what he did was in self defence, it would be no ground of defence, that the person assaulted was secretly armed. It might be that he had armed himself against the apprehended attack which actually took place.

We are, therefore, of opinion, that the motion in arrest of judgment, and for a new trial, should be overruled.

THRUSTON, J., absent.

The defendant was sentenced to the penitentiary for two years and an half, from the 2d of February, 1837.

JOSIAH THOMPSON AND WIFE v. GEORGE KING'S HEIRS.

A decree that one has a specific lien on a lot, for the amount expended in improving it, under an expectation of obtaining a title, authorizes him to come upon the insolvent estate of the owner of the lot as a general creditor, for the balance of the money thus expended, after crediting the proceeds of the sale of the lot.

THE bill in equity in this case was filed in 1826, by Josiah Thompson and his wife, against the heirs of George King, to obtain the conveyance of a house and lot in Georgetown, in execution of an agreement between Thompson and G. King, in the lifetime of the latter; or that the cost of the improvements made by Thompson, in expectation of obtaining the title, should

be decreed to be a specific lien on the lot, George King having died insolvent.

This Court, (CRANCH, C. J. *contra*,) in April, 1832, decreed a conveyance to Thompson; which decree was reversed by the Supreme Court of the United States in 1835, (9 Peters, 204,) "with instructions to this Court to order the property to be sold," "and the proceeds first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate of King."

Mr. Justice McLean, in delivering the opinion of the Court, said, "and if the terms of the contract were established so that the court could decree a specific execution of it, they would pronounce such a decree. But as a specific performance cannot be decreed, the inquiry remains, whether the complainant has a lien on the property for the money he expended in improving it." Again, he said, "If the money has been judiciously expended under such circumstances as to entitle the complainant to a lien, the court must give effect to it. It is an equitable mortgage, and, in a court of chancery, is as binding on the parties, as if a mortgage in form had been duly executed." "It would be most unjust to leave the complainant, as a creditor, to receive a dividend on the distribution of the estate of King." "Indeed, there can be no doubt that the complainant considered the property as his own; and it was so treated by George King, for he collected the rents as the agent of the complainant, and accounted to him for them."

The property was sold under the decree of the Court, but did not produce sufficient to pay the amount expended by Thompson in improvements, and his counsel, *Mr. R. S. Coxe* now contended that he was entitled to come in as a general creditor of the estate of George King for the balance.

Mr. C. Cox, contra, contended that it was not a debt due by George King in his lifetime; and if it was, it is barred by the statute of limitations.

Mr. R. S. Coxe, in reply, as to the limitation, contended that the debt, if it be one, was established by the decree of the Supreme Court, and cannot now be controverted.

CRANCH, C. J., was of opinion that Thompson could not now come in as a general creditor of King's estate for the balance.

MORSELL, J., *contra*.

THRUSTON, J., being absent, the case was continued to the next term, when upon further argument by the same counsel,

The COURT, (CRANCH, C. J., *contra*,) stopped *Mr. R. S. Coxe* in reply, and decided that Thompson could come in as a general

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creditor, upon the assets of George King's estate, for the difference between the amount of sales of the house and lot, and the amount of the value of Thompson's improvements as found by the auditor.

Reversed by the Supreme Court of the United States, 23d February, 1839; 13 Peters.

UNITED STATES, for the use of Keirle v. FEARSON.

The Court will, at a subsequent term, correct a judgment entered by mistake for too large a sum.

DEBT, on an administration-bond. Judgment for the whole amount of the plaintiff's claim, when the estate was insolvent.

Mr. Redin moved to quash the execution and correct the judgment which was confessed at the last term, it having been entered for about \$50 too much, as the defendant contends by mistake.

Mr. C. Coxe, contra. A judgment on an administration-bond cannot be for assets, as in an action against an executor or administrator. The judgment must be absolute.

The COURT being satisfied that Mr. W. L. Brent had confessed the judgment by mistake, ordered it to be corrected.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1837, AT WASHINGTON.

AMELIA T. DORSETT *v.* ROBERT MARSHALL *et. al.*

If personal property be conveyed to a trustee for the sole and separate use of a *feme covert*, her executors, administrators, and assigns, free and clear from any control or demand of the husband or his creditors, with leave to lend the money with the approbation of the wife, for her "like sole and separate use," money thus lent, and unpaid at the death of the wife, does not become the property of the husband; nor is he entitled thereto in equity; although, (standing in the place of administrator under the Maryland law of 1798, ch. 101, c. 5, § 8,) he might recover it at law.

ROBERT MARSHALL, the defendant, intermarried with Ann Berry. Shortly before the marriage, they entered into the following agreement: "Robert Marshall and Ann Berry; marriage contract: Whereas Robert Marshall and Ann Berry, both of Prince George's county, State of Maryland, are about to intermarry, it is therefore agreed by the parties before the marriage, that the said Ann Berry shall hold in herself all her right, title, and interest in the following funds of her own, namely, one hundred and fifty shares of stock in the Patriotic Bank, on which \$10 have been paid, which stock stands to the credit of Ann Berry; also one hundred and thirty-seven shares of stock in the Central Bank of Georgetown and Washington, upon which \$11 per share has been paid, and \$3,500 in the bonds of Charles Glover. Given under our hands and seals, this 17th day of February, 1820.

"Witness,

"James H. Y. Dorsett,

Robert Marshall, (Seal.

Ann Berry, (Seal.)"

Afterwards by indenture, dated the 1st of May, 1824, between Marshall and his wife of the first part, and Susan G. Beall of the other part, after reciting substantially the marriage agreement, and that Marshall did, at the same time agree to make any other or further instrument of conveyance which might be considered necessary fully to assure and convey the said stock and debts "to the sole and separate use of the said Ann Berry

her heirs and assigns, free and clear from any debts, control, demands, or incumbrances of the said Robert Marshall;” that the bank-stock had been sold by mutual consent; that judgment had been obtained against Glover for \$2,000, (part of the \$3,500) in the name of Robert Marshall, with interest and costs; and another judgment for \$1,500, with interest and costs; (being the residue of the said \$3,500,) and that the said Marshall and wife had agreed to settle those judgments and a certain tract of land therein mentioned and described, by a more full, complete, and formal instrument of writing than the marriage agreement above mentioned, according to the terms of the present instrument; Marshall and wife, in consideration of the premises, and for the more fully, completely, and perfectly carrying into effect the marriage contract between them, and in further consideration of five dollars paid to them by the said Susan G. Beall, bargain and sell to the said Susan G. Beall her heirs, executors, administrators, and assigns, the tract of fifty acres, therein described, for and during the joint lives of Marshall and wife and the survivor of them, and the two judgments against Glover. To have and to hold the land for life as aforesaid, and the judgments absolutely, “to the said Susan G. Beall, her heirs, executors, administrators, and assigns, in trust to hold the land for the use of Marshall and wife during their joint lives, and for the use of the husband, if he should survive his wife, during his natural life and no longer, upon the express agreement and understanding that the land should not be subject to, or liable for his debts or engagements; and further in trust that the said Robert Marshall should have to his own use, free of the marriage contract, the judgment against Glover for the \$2,000, with interest and costs, and the said Susan G. Beall should hold the other judgment for \$1,500, with interest and costs, “for the sole and separate use of the said Ann Marshall, her executors, administrators, and assigns, free and clear from any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and upon payment of the said judgment or any part thereof, to invest the said money in stock, or to loan the same on interest with the approbation of the said Ann Marshall; and in further trust that the said Ann Marshall, during the life of her husband, may dispose of said judgment, or the proceeds thereof; and of her right, interest, and estate in the said tract of land after the death of the said Robert Marshall, either by her last will and testament, or by any instrument of writing under her hand and seal in the presence of two witnesses, during her coverture in the same manner as if she were single.”

Mrs. Beall received the money upon the judgments against Glover, and, with the consent of Mrs. Marshall, lent \$100 to her

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husband, Robert Marshall, and \$400 to her sister, Mrs. Dorsett; and took their respective notes, payable "to Susan G. Beall, trustee for Ann Marshall."

Before these notes were paid, Mrs. Ann Marshall died, without having disposed of her property, in the manner designated in the deed of trust.

Mr. Marshall, standing in place of an administrator of his wife's estate, under the Maryland Act of 1798, c. 101, cl. 5, § 8, brought his action at law against Mrs. Dorsett for the \$400 lent to her by Mrs. Beall as trustee for Mrs. Marshall, and, under the opinion of this Court that the legal right of action was in him, by virtue of the said Act of Assembly of Maryland, recovered judgment, at March term, 1836, (4 Cranch, C. C. 696); and Mrs. Beall brought a suit at law against Mr. Marshall for the \$100 of the trust-money lent to him; upon which, on the 17th of April, 1835, he filed his bill stating all these matters, and claiming the whole of the trust-money as his own property by virtue of his marital rights, and obtained an injunction to stay execution against him, until the further order of the Court.

Mrs. Dorsett, also, filed her bill, on the 29th of November, 1836, against the said Robert Marshall, charging all these matters, and claiming, with others, the whole of Mrs. Marshall's interest in the trust-fund, as her next of kin, to the entire exclusion of Mr. Marshall; and on that ground praying an injunction to stay execution upon the judgment for the \$400 which he had recovered at law against her; and for leave to file this her bill of interpleader, and that the said Susan G. Beall and Robert Marshall, &c., may interplead; and that she may account for her "trusteeship;" that the trust-fund may be decreed to the heirs of Mrs. Marshall as before stated, "or to such as the law may give it to," &c.

Before any proceedings were had upon that bill, Mrs. Dorsett, on the 6th of February, 1837, filed another bill against the said Robert Marshall, Richard H. Marshall, Susan G. Beall, and the other heirs of the deceased Ann Marshall, in which she states the judgment at law for \$400 obtained against her by Robert Marshall, under the instruction of the Court to the jury that, by the law of Maryland he, as administrator of the estate of his wife, had a right at law, to recover the same; that he is insolvent, and, if he should receive the money, would be unable to refund it to the heirs of his wife if this Court should so decree; that by the marriage contract the property belongs to the heirs of his wife, and that he has no right to it; that he has filed his bill against Susan G. Beall, as trustee of his wife, and claims the property as his own and for his own use; that Susan G. Beall resists and defends

the said bill, upon the ground that the property belongs to her and the other co-heirs of Mrs. Marshall, (naming them,) who have interpleaded in "the said suit in chancery," and claimed the same; that the said Susan G. Beall, as trustee of Mrs. Marshall, has notified the complainant not to pay the amount of the judgment to the said Robert Marshall, who cannot recover the same in equity; that the said Robert Marshall, to defraud the heirs, has assigned the judgment to his brother, Richard H. Marshall, who has sued out an execution against the property of the complainant; wherefore she prayed an injunction, &c., which was ordered by one of the judges.

To this bill the defendants, R. and R. H. Marshall, demurred, for want of equity, and moved to dissolve the injunction, and dismiss the bill upon the same ground.

Mr. R. S. Coxe, for the defendants, contended that the marriage contract only restrained the marital rights of the husband during the coverture. That, under the Maryland Act of 1798, c. 101, cl. 5, § 8, the husband becomes the owner of all his wife's choses in action, not reduced into possession during the coverture, without taking out letters of administration upon her estate; and is entitled to sue upon them in his own right, and to recover for his own use. The wife's power of appointment was limited to the life of her husband, but she never exercised it. If the husband did not acquire the legal right to this money by the death of his wife, the defence should have been at law. The judgment in the action at law is conclusive.

The whole structure of this bill is anomalous and unprecedented. It is not a bill of interpleader.

The husband, under the Maryland law, stands in the place of administrator; and, therefore, has a right to claim under the trust, which was to her, her heirs, executors, and administrators. The word "heirs" refers to the real estate only; "administrators" to the personal.

The complainant ought to have brought the money into court, and denied collusion.

Mr. Coxe cited *Blake*, 31; *Eden*, 247; *Fettiplace v. Gorges*, 1 Ves. Jun. 46; 7 Dane's Abr. c. 19, p. 351; *Stewart v. Stewart*, 7 Johns. Ch. Rep. 229, 243, 244, 246; 2 Story's Equity, p. 113, 114, § 806, 807; *Id.* p. 116, 117, § 809, 810; *Id.* p. 127, § 824; *Fenner v. Taylor*, 1 Simons, 169; 2 Condensed English Ch. Rep. 86; *Sugden on Powers*, 315.

Mr. W. L. Brent and *Mr. Jones*, *contra*, cited *Ward and Wife v. Thompson*, 6 Gill & Johnson, 349; *Brailsford v. Georgia*, 3 Dall. 1; 1 Roper, 120, 130, 221; *Toler*, 225; *Watt v. Watt*, 3 Ves. 244; *Cranley v. Hale*, 14 Ves. 307; *Garrick v. Camden*,

14 Ves. 382; *Bailey v. Wright*, 18 Ves. 49; S. C. 1 Swanst. 39; *Wimbles v. Pitcher*, 12 Ves. 433; *Dawson v. Anderson*, 15 Ves. 532; 1 Mod. Rep. 45; *Rayner v. Mowbray*, 3 Bro. C. C. 234.

The COURT (*nem. con.*) was of opinion that Robert Marshall, the husband, had conveyed to Susan G. Beall, the trustee, all his marital rights over the property assigned to her; so that, in equity, he had no right thereto upon the death of his wife, although he might, at law, be entitled to recover in his own name, under the testamentary law of Maryland; and that the demurrer should be overruled, and the injunction continued until final hearing.

The Court also dissolved the injunction in the case of *Robert Marshall v. Susan G. Beall*.

CRANCH, C. J., after stating the case, delivered the following opinion:—

The only question now judicially before the Court is, whether there is sufficient equity in the present bill to sustain it.

It seems to me not to stand alone. It is connected with the two former bills, not only by reference, but by the subject-matter; and if all three bills are taken into view, or even the two last bills, I think there is sufficient equity. The Court has decided, at law, that, upon the death of the wife, the legal title to her personal estate and choses in action devolved upon the husband, and that he had a right of action against this complainant; although she had given her note for the money to Susan G. Beall, as trustee. The question now is, whether the next of kin of Mrs. Marshall are not, in equity, entitled to this money under the antenuptial contract, and the deed of trust made by Robert Marshall and his wife to Susan G. Beall.

I think they have; and that such was the intention of the parties, both in the antenuptial agreement, and in the deed intended to carry that agreement into effect. The words of that antenuptial agreement are, not that she shall have the use of her property during the coverture, with a power to dispose of it by will, or otherwise, but that she shall “hold in herself” the property designated; that is, it shall never go out of her, the marital right shall not affect it, it shall be retained as if she were sole. This seems to me to be the evident intent of the parties.

The deed of trust of the 1st of May, 1824, referring to the antenuptial contract of the 17th of February, 1820, states that “the said Robert Marshall did, at the same time, agree to make any other or further instrument of conveyance, which might be considered necessary, fully to assure and convey the said stock

and debts above mentioned to the sole and separate use of the said Ann Berry, her heirs, and assigns, free and clear from any debts, control, demands, or incumbrances, of the said Robert Marshall." And the indenture witnessed that the said Robert Marshall and Ann Marshall conveyed to the said Susan G. Beall, her heirs, and assigns, the property therein mentioned, including fifty acres of land on which they then resided, and which had descended to her from her father, in trust, to hold the land for the joint use of the husband and wife during their joint lives; and, if he should survive her, then during his life. And in trust, that the said Robert should have the \$2,000 dollar judgment against Glover, for his sole and separate use, free and clear of the marriage contract, and of her separate claim. And in further trust, that the said Susan G. Beall should hold the \$1,500 judgment for the sole and separate use of the said Ann Marshall, her executors, administrators, and assigns, free and clear of any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and to vest the money in stock, or to loan the same on interest, with the approbation of the said Ann Marshall, for the like sole and separate use of the said Ann Marshall. And in further trust, that the said Ann Marshall, during the life of her husband, might dispose of the said judgment, or its proceeds, by her last will and testament, or by any instrument of writing under her hand and seal, in the presence of two witnesses, during her coverture, in the same manner as if she were single.

All the property conveyed by this deed of trust belonged to the wife, and was secured to her sole and separate use by the marriage contract; but, by this deed, she gives her husband an absolute life estate in the land, instead of a contingent estate by curtesy, of which, at that time, he had only a possibility, as he had no child by that wife; and she also gives him absolutely the judgment against Glover, for \$2,000 and interest, in consideration of which he conveys to the trustee all his right, if he had any, in the \$1,500 judgment, and conveys it absolutely, for the use of his wife, not only during the coverture, but for the use of herself, her executors, administrators, and assigns, which is as great an estate as can be granted in a chattel. He parted with his whole marital right over that subject for a valuable, and more than adequate consideration; and it is against conscience for him now to set up this claim. The Act of Maryland devolves upon the surviving husband the legal right to the choses in action of his wife; but he takes them bound by all his conscientious obligations.

I am, therefore, of opinion that there is sufficient equity in the

bill to support a decree, and that the injunction ought to be continued until final hearing.

It has been suggested, that the power reserved to the wife by the deed of trust, to dispose of the trust-fund during the coverture, implies a remaining interest, or title, in the husband to that fund. But her disability to control the trust-fund did not result from any remaining title in the husband, but from the general disability of a *feme covert* to make any contract, or to dispose of her property in any manner, during the coverture; and the deed of trust was evidently intended to remove that disability, and not merely to impart to her a power limited to the period of her coverture, or to limit her power of disposing of her property to that period. If the husband had died first, her *jus disponendi* would have revived in as full force as she enjoyed it before her marriage.

W. G. W. WHITE v. CLARKE AND BRISCOE.

Courts of equity have jurisdiction to decree the surrender of negotiable notes, unconscientiously withheld by the defendant.

If goods be sold at an abatement of five per cent. from the invoice price, upon the vendee's assurance that the notes given by him therefor should be punctually paid, and he suffers one of them to be protested, and the vendor afterwards receives goods for his claim, at seventy per cent., the seventy per cent. is to be calculated upon the amount due upon the notes, and not upon the full invoice price.

The rule, that if a debtor, in compounding with his creditors, secretly promises to give to one more than to the others, in order to induce him to sign the instrument of composition, it is void, only applies to cases where the creditors are supposed mutually to agree with each other, as well as with the debtor. But when each creditor is separately compounded with, this principle of mutuality and equality does not apply.

Each creditor has a right to make his own bargain with his debtor, and one bargain cannot be void because it is better than another.

A fraud in another transaction between the complainant and others, not parties to the cause, cannot invalidate the transaction between the parties to the suit before the Court.

THE bill in equity in this case states, that on the 2d of July, 1832, the complainant passed to the defendants his twenty-six promissory notes of that date, each for \$274.67, payable to them at different times, from sixteen to forty-four months, amounting to \$7,141.-42, three of which notes had been passed away by the defendants to Clagett & Washington; that on the 30th of December, 1833, he entered into an agreement with the defendants, to anticipate the payment of those notes, and to deliver to them, and they agreed to receive of the complainant, goods in his store, "in full payment of the said sum of money, at the rate of seventy cents in the dollar on the price the said goods and merchandise were marked

to have cost ; and the said Clarke and Briscoe did further agree to deliver to your orator, to be cancelled, on the delivery of the said goods and merchandise, all the said promissory notes then in their possession, and speedily to pay and take up such of the said notes as had then been negotiated and were in the hands of other persons, and to deliver them to your orator in like manner to be cancelled."

That the complainant fulfilled the agreement on his part, in every particular, and delivered the goods to the full amount, except a fraction of \$1.41, in payment of the said sum of \$7,141.42 at the rate of seventy cents in the dollar on the prime and marked cost of the said goods and merchandise, which they accepted, on the terms of the said agreement, in satisfaction and payment of the said sum of money, without objection known to the complainant, who has tendered to deliver, and is ready to deliver to them goods and merchandise to the value of \$1.41. That the complainant has demanded the notes which the defendants refuse to deliver up to be cancelled, &c.

It then prays the Court to order the defendants to bring the notes into Court ; and to pay the notes held by Clagett & Washington ; and for general relief.

The answer of the defendants states that the consideration of the notes was the sale of a large invoice of goods by them to the complainant from which they agreed to deduct five per cent. in consideration of his solemn promise that the notes should be punctually paid. They deny that they made the agreement respecting the compromise of their claim, and the cancelling of their notes, in the terms and upon the conditions set forth in the bill. But they aver that about the time mentioned in the bill, in consequence of hearing that the complainant had failed in business and was compromising with his creditors, a conversation and arrangement did take place between the defendant Clarke and the complainant, in which the said defendant asked him upon what terms he would settle the whole claim of the defendants ; not merely on what terms he would settle the amount of the said notes. The complainant offered sixty cents in the dollar payable in goods ; but upon the said defendants' saying that they understood that he had compromised with other creditors at seventy, he agreed to pay the defendants in goods the whole amount of their claim at the rate of seventy cents in the dollar ; and pay the difference, namely, thirty cents when he was able ; and it was not till after the said arrangement had been so agreed upon that any thing was said between them about the defendants' getting up and cancelling the complainant's notes ; but it was afterwards arranged between them that upon the settlement of the defendants' whole

claim by paying the same in goods at the rate of seventy cents in the dollar, the defendants should get in and cancel the said notes; not upon the settlement, in that mode, of the amount of the notes merely; such was not the understanding of the defendants; but the amount understood by Clarke, at the time, was the amount of the original invoice from which five per cent. had been deducted when the notes were given upon the assurance of the complainant that the notes should be punctually paid; and as the complainant had failed totally to comply with that assurance the defendants considered that in equity and strict justice they were entitled to the amount of the invoice without such deduction.

That the complainant had not complied substantially or otherwise with the terms of the said compromise, in the sense in which it was properly understood and agreed as aforesaid, so as to entitle him to call in the said notes in consideration of goods delivered by him in consequence of such compromise. That according to such compromise, in the terms in which it was made and understood on the part of the defendants, the notes were to be got in and cancelled upon the entire settlement of the defendants' said claim, and not otherwise; especially not upon the liquidation, at the rate aforesaid, of the mere amount of the notes.

That the said terms have not been complied with on the part of the complainant, and he has refused to comply with the same, having delivered goods only to the amount stated in his bill, refusing to deliver goods to the amount of the goods originally delivered to him by the defendants without said deduction.

The defendants complain that a great part of the goods were remnants, and that it was a hard compromise on their part if it had been complied with.

But they allege that it was not binding on them because obtained by fraud practised by the complainant upon the defendants and other creditors of the complainant, in order to alarm them into a compromise. That the whole matter of his pretended failure was a deliberate, artful, and fraudulent scheme of the complainant, to alarm and force his creditors into compromises, while, in fact, he was possessed of ample means to pay off all his debts and have a surplus on hand; that with such ample means in his hands, and with a fraudulent design to conceal and appropriate the same to his own illicit and fraudulent gains, he proclaimed his own failure and insolvency, and went about, under the alarm thus communicated to his creditors, and with false representations of his desperate circumstances, to catch up the most advantageous compromises he could with them, one by one; his offers of compromise varying from forty to eighty-seven and a half cents in the dollar, actually effecting compromises with some at the

lowest rate, and with others at the highest. That preparatory to this scheme of fraudulent failure, and shortly before it was proclaimed, he had made unusually large purchases on credit, and shortly after gave out his failure in business and insolvency, and set on foot his plan of fraudulent compromises. That it was under the greatest pressure of this alarm, and while it was fraudulently used by the complainant to practise upon the fears of his creditors, that the defendants were fraudulently and deceitfully drawn by him into such agreement for the compromise, as they have stated and admitted; and they believe that his scheme of a pretended and fraudulent failure had been meditated and prepared by the complainant before he made his purchase of the defendants and gave his notes; and that a few days after that transaction, namely, about the 9th of July, 1832, he caused to be entered in the land records of this county a fraudulent deed, settling valuable property on his family, which had been executed in the month of January preceding, and in the mean time kept secret.

To this answer the complainant filed a general replication; and a commission to take depositions was issued, under which sundry depositions were taken, and by consent, all the papers, except the bill and answer, filed in the case of *Hall et al. v. White*, at December term, 1833, were permitted to be read in evidence in this cause.

At the hearing, *Mr. W. L. Brent* and *Mr. Marbury*, for the complainant, contended that according to the compromise as proved, the 70 per cent. was to be computed upon the amount of the notes then outstanding, and not upon the invoice price of the goods, and that there was no fraud on the part of the plaintiff in effecting the compromise; and that the notes ought to be delivered up, as the terms of the compromise had been faithfully complied with by the complainant, whether the defendants did or did not expressly promise to give them up. They were negotiable, and the complainant ought not to be kept in fear of being harrassed by them, as he might be if they should be negotiated. That a court of equity has a clear jurisdiction to decree a surrender of them to be cancelled. *Hamilton v. Cummings*, 1 Johns. Ch. Rep. 517. That no objection can arise from the fact that he made better terms with some of his creditors than with others, as each was acting for himself alone.

Mr. Hoban and *Mr. Jones*, *contra*, contended that the answer of the defendants, stating the terms of the compromise, being responsive to the statement of the compromise in the bill, is evidence for the defendants, unless contradicted by two witnesses, or by one corroborated by circumstances.

That as the abatement of five per cent. from the invoice price

was made upon the assurance of the complainant that the notes should be punctually paid; when he failed to pay punctually the defendants were remitted to their original right, and were entitled to the whole invoice price, and were not bound to give up the notes unless that whole price should be paid by the complainant. *Small v. Musson*, 1 Vern. 210; *Leigh v. Barry*, 3 Atk. 583; *McKenzie v. McKenzie*, 16 Ves. 372; *Bennett's case*, 2 Atk. 527. That this Court has no jurisdiction to decree a specific execution of a verbal contract relating to personal estate, upon the ground of contract only. *Greenwood v. Ledbetter*, 12 Price, 183.

That the compromise was obtained under fraudulent and false pretences. *Pollen v. Theband*, 1 P. Williams, 751; *Hovenden on Frauds*, 13, 14; *Huguenin v. Barclay*, 14 Ves. 289; *Roche v. O'Brien*, 1 Ball & Beatty, 340; *Childs v. Danbridge*, 2 Vern. 71; *Cecil v. Plaistow*, 1 Anstruther, 202; *Mawson v. Stock*, 6 Ves. 300; *Jackman v. Michell*, 13 Ves. 581; *Sadler v. Jackson*, 15 Ves. 52, 55; *Leicester v. Rose*, 4 East, 372; *Constantine v. Blache*, 1 Cox, 287; *Chapple v. Ashley*, Dow. & Ry. 27; *Cockshott v. Bennett*, 2 T. R. 763; *Fawcett v. Gee*, 3 Anstruther, 910; *Smith v. Cuff*, 6 M. & S. 160; *Spooner v. Whiston*, 8 Moor, 580; *Jackson v. Lomas*, 4 T. R. 166; *Colman v. Waller*, 3 Younge & Jervis, 212; 1 Story's Equity, 199, 236, 356, 366.

CRANCH, C. J., after stating the substance of the bill, answer, and evidence, delivered the opinion of the Court;

It is contended by the counsel for the defendants that the bill contains no ground for jurisdiction in equity; that courts of equity will not enforce the specific execution of parol agreements respecting personal property; that all the cases in which those courts have decreed the specific performance of agreements respecting chattels, were cases upon written contracts. But in the present case the equity of the complainant does not depend entirely upon the contract, but upon the refusal of the defendants to deliver up negotiable notes which, under the circumstances of the case, they would unconscientiously withhold even if they had not expressly agreed to surrender them. 2 Story's Equity, p. 22, § 715, and p. 24, § 717. The danger that the defendants might pass them away before maturity, by which the complainant would be deprived of his legal defence, seems to me to be a sufficient ground for the interference of a court of equity. But the jurisdiction of a court of equity to compel the surrender of instruments, especially of negotiable instruments, unconscientiously withheld, seems to be put beyond doubt by Chancellor Kent in *Hamilton v. Cummins*; and by Mr. Justice Story in his Commentaries on Equity Jurisprudence, vol. 2, p. 11, § 700, and p. 15, § 705.

Admitting the jurisdiction, three principal questions arise ;

1st. What was the contract of the 30th of December, 1833 ?

2d. Was it obtained by fraud or imposition practised by the complainant upon the defendants ?

3d. If it was a valid contract, has it been complied with on the part of the complainant ?

1. What was the contract ?

The defendants, in their answer admit that, on the 30th of December, 1833, there was an agreement with the complainant for a compromise of their just claim upon him, by which he agreed to pay, and they agreed to receive the whole amount of their claim, at the rate of seventy cents in the dollar, payable in goods in his store ; that in consequence of such compromise he delivered to them, and they received, goods to the amount stated in his bill, (that is, to the amount of the notes, at seventy cents in the dollar, with the exception of a fraction of \$1.41, which the complainant avers he was always ready to deliver, &c.)

Admitting then (that which the complainant is not bound to admit) namely, that the compromise was upon the terms stated in the answer, the question is, what was the amount of the defendants' just claim against the complainant on the 30th of December, 1833 ?

The forty-four notes were given for the exact amount of the purchase-money of the goods sold by the defendants to the complainant on the 2d of July, 1832. The complainant never owed them a larger sum for those goods. The amount of the notes was the debt, and the whole debt, compounded. The complainant had paid, punctually, the first fifteen notes, each note being for \$274.67 amounting, in all, to \$4,120.25. Three more of the notes had been paid by Mr. Van Ness, amounting to \$824.01. The sixteenth note, due November 5th, 1833, had been renewed, by mutual consent, for sixty days. The seventeenth note, due December 5th, 1833, was not paid, and was then lying under protest from the 6th to the 30th of December. But the failure of the complainant to pay that note, at maturity, did not give the defendants any new right, or restore them to any previous right, as in cases of compounding debts, where, if the composition is not punctually paid, the creditor is remitted to his original rights. The remaining notes had time to run, from one to twenty-seven months. The just claim of the defendants, therefore, on the 30th of December, 1833, was not even to the amount due upon the face of the notes ; but to that amount, (minus the discount for the time they had to run,) and the interest and cost of protest upon that which became payable on the 5th of December, 1833.

The defendants, in their answer, admit payment of the full amount of the notes, in goods, upon the terms, and at the rates, of the compromise; they, have, therefore, received payment, in the stipulated mode, of at least the full amount of their just claim.

This is my view, of this part of the case, founded upon the defendants' answer alone; and it is strongly corroborated by the testimony of the witnesses, and by the acts of the defendants themselves.

Mr. Brannan testifies that Mr. Clarke, the defendant, originated the proposition for the compromise; and asked Mr. White, the complainant, how much he would give him for his claim; and that seventy cents in the dollar was agreed upon, to be paid in goods at the marked cost price. It appears from his deposition, and those of James L. White and Cornelius G. Wildman, that before the goods were delivered, the complainant asked Mr. Clarke, who was then in the complainant's shop, for the amount of his claim; to which Mr. Clarke replied, "send in your young man to my store and he will get it." That Mr. Wildman was, accordingly, immediately sent by Mr. White to the defendant's store for that purpose, and the defendant, Mr. Briscoe, gave him the paper marked A., annexed to the complainant's exhibit No. 1, which is a statement of forty-four notes, from one to forty-four months; for \$274.67 each \$12,085.48

Fifteen duly paid, 4,120.05

7,965.43

Three paid by Van Ness, 824.01

\$7,141.42

That Mr. Clarke, the defendant, continued to take goods until his claim was satisfied. And it appears by the deposition of James T. Clarke, that an inventory of the goods taken was made at the time and delivered by Mr. Brannan, the complainant's clerk, to the defendants, immediately after the delivery of the goods, to show the amount, and that they might examine it. The inventory is produced and verified by the witness. It amounts to \$4,997.58. The amount of the notes, without allowing any discount for the time they had to run, was \$7,141.42, which at seventy cents in the dollar is \$4,998.99, being \$1.41 more than the goods taken.

There is no evidence that the defendants asked to take any thing more, or even suggested that they had any further claim. The transaction itself shows that the complainant understood the amount of the unpaid notes to be the whole amount of the defendants' claim, and that the defendants acquiesced in that

understanding. At all events, the admissions of the defendants, in their answer, show that the notes have been satisfied, and therefore they ought, not only according to equity and conscience, but by the express agreement of the defendants, to be given up; unless the agreement for the compromise was obtained by fraud practised by the complainant upon the defendants.

2. Was it thus obtained?

The nature of the fraud, alleged in the defendants' answer, is that the complainant, by false representations of his inability to pay all his debts, had induced some of his creditors to compound their claims; that the defendants, hearing reports of such compromises, became alarmed, and under that alarm, willing to secure what they could, agreed to the composition, when, in fact, the complainant was able to pay all his debts. That the complainant took an unconscientious advantage of that alarm, knowing himself to be solvent, and that the defendants believed him to be insolvent.

To maintain this defence the defendants must prove, first, the representations; second, that they were false and that the complainant knew that they were false when he made them; third, that such false representations induced some creditor or creditors of the complainant to compound their claims; fourth, that the defendants had heard of such false representations and composition, and were thereby, or by other false representations of the complainant in relation to his affairs, and his inability to pay all his debts, made to themselves or others, with intent to injure some one, induced to make the compromise; and that the complainant knew, at that time, that the defendants were so induced, and acted under a state of alarm produced by such false representations and information.

There is no evidence that the complainant made any representation or pretence of insolvency before the protest of some of his notes in November, 1833; and his letters to A. Hart & Co., of the 30th of October; to Tiffany & Co., of the 14th and 16th of November, and to Hall & Co., of the 21st of November, produced in evidence by the defendants, show an earnest desire on the part of the complainant to prevent those protests, and to maintain his credit. There can hardly be a stronger proof of his sincerity, and of the good faith in which he made his purchases, that fall, than the fact that between the 1st of September and the 6th of December, when his shop was closed by an injunction obtained by his Baltimore creditors, he paid debts, in cash, to the amount of \$12,000, as appears by the affidavit and deposition of Mr. Wildman, who exhibits an account of the particular items to which the money was applied.

I have said that there was no evidence that the complainant made any representation or pretence of insolvency before the protest of some of his notes in November; perhaps I ought to have excepted the testimony of Mr. Henry B. Clarke, who says that in the fall of 1833, about three weeks before Mr. White went to New York the first time and made his large purchases, in a conversation between Mr. White and Mr. Briscoe, who was regretting the failure of Mr. Henry Carter, he heard Mr. White remark to Mr. Briscoe, that he had better be sorry for himself, for he, Mr. White knew that "he himself was not able to pay his own debts." What Mr. Briscoe said in reply, the witness does not recollect. Mr. White appeared to be quite serious. The witness afterward, he thinks on the same evening, or shortly after that, heard Mr. Briscoe say that he was fearful of losing the debt due by Mr. White to Clarke and Briscoe.

It seems to be very improbable that Mr. White should have said this seriously, with intent to alarm Mr. Briscoe into a compromise, when he was about to go to New York to purchase his fall supply of goods. Mr. Briscoe took no steps, in consequence of it, to get security for the debt. It can scarcely be believed that it caused the compromise of the 30th of December, 1833. Up to the time when the complainant's storehouse was shut up by the injunction on the 6th of December, there had been nothing in the complainant's conduct or conversation to excite alarm, except the protest of one or two of his notes, and an application to some of his creditors for an extension of time. This is testified by Mr. James L. White, and corroborated by Mr. Brannan and Mr. Wildman. There is no evidence of any assertion or pretence of insolvency by Mr. White until after his Baltimore creditors or some of them as agents of the others, came here and in a manner compelled him to give them a statement of his affairs, which, when made, showed that he was unable to pay all his debts. His Baltimore creditors then charged him with fraudulently obtaining their goods, under pretence of being solvent when he knew himself to be insolvent; and, upon the idea that the sales to him were void by reason of the fraud, and the right of property not changed, although so mingled with other goods that they could not be replevied at law, they filed a bill in chancery and obtained an injunction to prevent the then defendant but now complainant from selling or removing the goods until the further order of the Court. This injunction remained until the 26th of December, 1833, when it was dissolved on affidavits.

There is no evidence of any thing said or done by the complainant in order to excite alarm among his creditors.

I deem it unnecessary in this case to inquire whether the com-

plainant in making his purchases in the fall of 1833, intended to defraud those vendors. The purchase made by the complainant of the defendants' goods, was in July, 1832, and in no manner connected with the purchases made by the complainant in 1833. The alleged ground of fraud in the one case is exactly the reverse of that alleged in the other. The purchases in 1833 were said to be fraudulent because the complainant represented himself to be solvent when he knew himself to be insolvent. The charge in the present case is, that he represented himself to be insolvent when he knew himself to be solvent. They have, in fact, no relation to each other.

The authorities cited to show, that if a debtor, in compounding with his creditors, secretly promises to give to one, more than to the others, in order to induce him to sign the instrument of composition, it is void, are only applicable to cases where the creditors are supposed mutually to agree with each other, as well as with the debtor. But where each creditor is separately compounded with, this principle of mutuality and equality does not apply. Each creditor has a right to make his own bargain with his debtor; and one bargain cannot be void because it is better than another.

The purchase of a lot in the name of his children and building a house upon it, if he was solvent at the time, would not be even a technical fraud upon his creditors; but if he was not solvent, it would be only a technical fraud, which would be set aside in favor of creditors only, or subsequent purchasers. A copy of the deed is not produced in evidence, but it is said that it recites that the purchase-money belonged to his children, and there is no evidence to contradict the recital. If the deed is offered in evidence it must be taken altogether, and the burden of proof is on the defendants to contradict any part of it. It was made in January, 1832, nearly two years before the compromise; and even if it was fraudulent, it is no way connected with the compromise. It was registered in July, 1832, and any one interested might at any time have had access to the record.

It is very natural to suppose that the heavy charges of fraud made against the complainant by his Baltimore creditors in the beginning of December, 1833, and the severe proceedings they instituted against him; the sequestration of his whole stock in trade, and the total suspension of his business by the injunction, were sufficient, of themselves, to cause the alarm, under which the defendants, as soon as the injunction was dissolved, (which was on the 26th of December,) sought a compromise by a payment in the goods which had thus, as to them, been put in jeopardy. There is no evidence to show that that alarm had

been voluntarily created by the complainant, and the defendants seem to have been content with their share in the scramble which followed the removal of the injunction. Every one was, no doubt, anxious to save all he could from the wreck; and the subsequent settlement with other creditors, at fifty cents in the dollar, only shows that the defendants, in getting seventy, fared better than some of their neighbors. The notes, excepting that which fell due 2d-5th of December, were not payable, having time to run, from one to twenty-seven months, without interest; the immediate payment, therefore, especially in the precarious state of the complainant's affairs, was a good and valuable consideration for the discount which was agreed upon. Looking upon this compromise, therefore, in every point of view, it seems to me to have been a fair and valid contract, which ought to be executed by both parties in good faith.

3. The third question, then, is, has it been complied with on the part of the complainant?

The defendants admit, in their answer, that it has been complied with on his part to the extent of the notes.

Being of opinion that the amount due upon the notes constituted the whole just claim of the defendants; and there being no evidence that at the time of the agreement for the compromise, and at the time of the execution of that compromise by the delivery of the goods, they intimated any further claim, I must say that, in my opinion, the complainant has fairly and fully complied with the terms of the contract, and that the defendants ought to deliver up all the notes to be cancelled.

MORSELL, J., concurred; THRUSTON, J., dissented.

The decree was entered up on the 10th of June, 1837, and was in substance, that the injunction should be perpetual to prevent the defendants from negotiating the notes; that the defendants should bring them into court to be cancelled, and that they should pay the complainant \$1,083.55, being the amount paid by the complainant on judgments obtained against him upon three of the notes which the defendants had passed away, with interest thereon from the date of the decree.

From this decree the defendants appealed to the Supreme Court of the United States, where it was affirmed in February, 1833. 12 Peters, 178.

UNITED STATES v. LUCRETIA CARRICO.

A witness cannot be rejected in consequence of having been provoked to bet upon the event of the trial.

A wager upon the event of the trial is void in law.

INDICTMENT for assaulting and beating a Mrs. Collard. Mary

Hutchinson, a witness for the United States, upon cross-examination, admitted that one James C. Deneale, who had irritated the witness, and by whose advice the defendant had cowhided Mrs. Collard, told the witness, before the trial, that he would bet her five dollars that Mrs. Collard would be cast; and the witness agreed to the wager.

Mr. W. L. Brent, for the defendant, objected, and contended that the testimony which the witness had given should be rejected.

The COURT said, that the wager was void in law, and that the witness, not being, in fact, interested, could not be excluded; but that the circumstances attending the wager would go to the credit of the witness.

UNITED STATES v. THOMAS COOKENDORFER.

After the term in which a recognizance has been forfeited, in a criminal case, the Court cannot remit the forfeiture; but the President of the United States can, under the Act of Congress of the 17th of June, 1812.

SCIRE FACIAS on a recognizance dated January 12th, 1835, in the sum of \$1,000, to be paid if Francis Dixon should not appear on the 13th of January, 1835, or should depart from the Court without its leave. The recognizance was respited till March term, 1835, and from that term till November term, 1835, when Dixon was called, and, not appearing, his default, and that of his surety, the defendant, were entered of record, and this *scire facias* was issued thereon returnable to March term, 1836. A new *capias* was also issued against Dixon, returnable to the same term, and was returned *non est*.

Neither the *scire facias*, nor the recognizance, states the offence with which Dixon was charged, or for which he was arrested; nor does it appear upon the record in this case.

Mr. Dandridge, for the defendant, moved the Court to discharge the parties, principal and bail, from the obligation of this recognizance; and contended that this Court has the same power to remit the forfeiture that the Court of Exchequer has in England.

The ground of the motion is that since the forfeiture, the indictment, for the offences with which Dixon was charged, has been quashed by the Court for the reasons stated in *Cooly's case*, at March term, 1836, (4 Cranch, C. C. 707,) which fact was conceded by the District Attorney.

Mr. Dandridge cited *Davidson v. Taylor*, 12 Wheat. 604; *King v. Tomb*, 10 Mod. 278; *Belither v. Gibbs*, 4 Burr. 2118; *Ree v. Spenser*, 1 Wils. 315; 3 Petersdorff, 251, 356; The Maryland

Hill v. Corporation of Washington.

Act of 1782, c. 42, § 2; *Beers v. Haughton*, 9 Peters, 358. See also 1 Chitty's Crim. Law, 300-303.

The COURT (MORSELL, J., *contrà*,) was of opinion that after the term in which a recognizance has been forfeited, in a criminal case, they have no power to remit the forfeiture, and overruled *Mr. Dandridge's* motion; but recommended the case to the consideration of the President of the United States, who made this indorsement on the petition: "The indictment having been quashed the recognizance ought not to be enforced. On that sole ground the remission is directed on payment of costs. M. V. B."

 ANN A. HILL v. CORPORATION OF WASHINGTON.

Under the power "to lay and collect taxes upon the real and personal property within the city," the corporation of Washington has a right to pass a by-law requiring every person bringing or sending any slave or slaves into the city, to hire or reside therein, to cause such slave or slaves to be recorded in the books of the corporation, and to deposit with the register an affidavit that such slave or slaves are *bonâ fide* his or her property.

APPEAL from three judgments rendered by a justice of the peace against the appellant for the penalty of \$20 in each case, for not causing three slaves to be recorded on the books of the corporation, which she had brought into the city to reside; and for not depositing with the register an affidavit that they were *bonâ fide* her property, within twenty days after bringing them in, contrary to the by-law of the 5th of April, 1823, c. 80, § 5.

Mr. Clement Cox and *Mr. Dandridge* contended that the corporation of Washington had no power to make such a by-law, as their charter gives them no such express power, and as it is not necessary for the exercise of any power expressly given.

Mr. Bradley, contrà. It is necessary that slaves should be registered in order to enable the corporation to execute the power to restrain the nightly meetings of free negroes and slaves. It is necessary also in order to ascertain when slaves are here without being under the control of their masters. It is also necessary, in order to know (when a slave is fined) who the owner is who is to pay the fine. The corporation itself is to judge of the necessity of the means used to carry into effect its express powers. A tax is laid expressly upon the slaves of non-residents, higher than upon the slaves of residents. A register of the slaves of non-residents is necessary in order to make this discrimination.

In reply, it was said, that the powers of corporations are to be construed strictly. 2 Kyd, 167; 7 Cowen, Rep. 606.

That the corporation has no authority to discriminate between

the slaves of residents and non-residents as to their taxation. That under the general law, the owners of slaves have a right to bring them here and the corporation has no right to prevent them, nor to burden them with extraordinary taxes.

CRANCH, C. J. The power "to lay and collect taxes upon the real and personal property within the city," includes the power to use the means of ascertaining such property, and the owners thereof. Slaves might be brought into the city and hired out here for years before the officers of the corporation could know it. It is necessary, to the full enjoyment of the right of taxation, that some means should be used to ascertain the bringing in of that kind of property as soon as possible. The means adopted in the by-law is reasonable and proper, and therefore warranted by the charter.

THRUSTON, J., concurred. MORSELL, J., dissented.

UNITED STATES v. JAMES HASTINGS.

After a sentence of imprisonment has been in part executed, the Court will not rescind it and grant a new trial, although moved for at the same term, it being doubtful whether the Court has the power to do so.

INDICTMENT for stealing wood from General Van Ness, of the value of seventy-five cents. The defendant was found guilty on the 7th of April, 1837, in the absence of CRANCH, C. J., and immediately sentenced to be imprisoned one month and to pay a fine of one dollar, the jury having recommended him to mercy and his counsel having waived the usual delay of four days, given to move in arrest of judgment or for a new trial. On the 10th of April, 1837, his counsel filed a motion for a new trial founded upon the uncertainty of the evidence, and upon affidavits discrediting the principal witness, Samuel Martin. On motion of the District Attorney, a day was given to obtain affidavits to sustain the credit of the witness. On the day of April, the motion was heard, and a new trial refused, CRANCH, C. J., saying that he did not think the grounds stated in the affidavits to be sufficient, but not giving any opinion as to the merits of the case as it appeared upon the trial, as he was not then present.

The motion was now (April 19th,) renewed upon a strong representation of many of the most respectable men in Georgetown, as to the good character of the defendant.

CRANCH, C. J., and THRUSTON, J., were of opinion that a new trial might be granted, but MORSELL, J., did not concur.

Mr. Key, the District Attorney, doubted whether the Court has

the power to rescind a judgment partly executed and grant a new trial. The defendant has been imprisoned under the sentence ever since the 7th of April, and cannot be tried again. When the judgment is recorded it cannot be altered by the Court. It is in civil cases only that judgments are under the control of the Court during the term. 1 Chitty, 700, 722, 724, 726.

April 21st, *Mr. Hoban*, for the defendant, moved the Court to rescind the residue of the sentence. *Mr. Key* did not object, except as to the costs.

Mr. Hoban cited 1 Chitty, 722; *The King v. Loveden*, 8 T. R. 615; 2 Hawkins, c. 48, § 20; *Nathaniel Redding's case*, T. Raym. 376.

The COURT (THRUSTON, J., absent,) remitted the remaining part of the sentence of imprisonment, but not as to the costs.

The COURT had previously (*nem. con.*) refused a new trial, having great doubt of their power to rescind the sentence after it was in part executed. CRANCH, C. J., however, was inclined to the opinion that the Court had the power to do so, and to grant a new trial.

UNITED STATES v. RICHARD H. WHITE.

The defendant, in a prosecution for a misdemeanor, is not entitled to the benefit of the limitation in the Act of Congress of the 30th of April, 1790, § 31, if, within the two years he fled from justice; although he should within the two years have returned openly to the place where the offence was committed, so that with ordinary diligence and due means he might have been arrested.

If, within two years after the commission of the offence, the defendant left the district in which it was committed with intent to avoid detection or punishment for that offence, he was a "person fleeing from justice," although he might at various other periods, within the two years, have been arrested in the United States.

It is improper to give any instruction to the jury, (after they have retired,) upon any question not asked by the jury.

Upon trial of the general issue, the United States may give evidence to show, that the defendant fled from justice, although that fact should not be averred in the indictment, and although it should appear upon the record that the offence was committed more than two years before the indictment was found.

THIS cause came on again for trial upon the *venire de novo* awarded at the last term. (*Ante*, 38.)

The jurors, as called to the book, were sworn on the *voir dire*, and the chief justice put this question to each of them, namely: "Have you formed and delivered any opinion as to the guilt or innocence of the prisoner, Richard H. White, upon the indictment upon which he is now to be tried?"

Twenty-nine were rejected upon their answer in the affirmative.

Messrs. Brent & Brent, for the defendant, contended that as it appeared upon the face of the indictment and the record, that the

offence was committed more than two years before the finding of the indictment, the United States could not give evidence of the defendant's fleeing from justice, without an averment of that fact in the indictment, or by a special replication. Proof without allegation is not sufficient. *Scott v. Lunt*, 7 Peters, 607.

Upon this point, CRANCH, C. J., delivered the following opinion: Mr. Brent, for the defendant, denies the right of the United States to give evidence to show that the defendant was a person fleeing from justice; because there is no allegation in the indictment that he was so fleeing; and it appears upon the record that the offence was committed more than two years before the indictment was found.

On the 19th of December last, before the first jury was sworn in this cause, Mr. Brent moved the Court to quash this indictment, for the same cause. The Court overruled the motion, because they thought it was competent for the attorney of the United States, upon the trial, to show that the offence was committed on a different day, or that the defendant was a person fleeing from justice, and the defendant might avail himself of the limitation, upon the trial, if he was entitled to its benefit.

On the 19th of January last, Mr. Brent moved the Court to arrest the judgment in *Henry White's case*, upon the same ground, namely, that it appeared upon the record that the offence was committed more than two years before the indictment was found; and the decision of this Court in *Watkins's case*, (3 Cranch, C. C. 441,) upon the demurrer to the indictment on the transaction with Hambleton, was cited, in which the demurrer was sustained upon the same ground.

In giving the opinion of the majority of the judges upon that motion, in *Henry White's case*, a distinction was taken between the case, as it would have appeared upon a demurrer to the indictment, and as it appeared upon the motion in arrest of judgment; showing that upon a demurrer to the declaration, the judgment must be upon the record, as it then was; and upon a motion in arrest of judgment, after verdict, the judgment must be upon the whole record, as it then was.

This Court, in that case, said: "The Court is bound to take notice that the defendant, upon the plea of 'not guilty,' had a right to avail himself of the plea of limitation of time, if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefit;" and again this Court said: "the parties had clearly a right, under the general issue, to litigate the question of limitation of time." And again this Court said: "There can be no doubt that the United States, upon the issue of 'not guilty,' might have given evidence to show that the defend-

ant was a person fleeing from justice." And again, "A defendant who is permitted to avail himself of the benefit of the statute of limitations, upon the general issue in a criminal cause, ought not thereby to be placed in a better condition than if he had pleaded it specially." "If he chooses to rely upon the statute, without pleading it, he must take it with all its burdens, and liable to all its provisos and exceptions."

Upon the trial, the averment, in this indictment, that the offence was committed on the 30th of March, 1833, is only evidence of that fact, and relieves the defendant from the burden of proving it. If, instead of this admission of the fact, it had been proved by the defendant in any other manner, there can be no doubt that the United States might have rebutted it, by evidence that the defendant was a person fleeing from justice; the means by which the fact is proved, cannot deprive the United States of the right to rebut it.

Upon the trial, the limitation is only a *primâ facie* bar, which may be removed by showing a fleeing from justice; and upon the trial of the general issue, it is immaterial whether that *primâ facie* bar is proved or admitted; it may, in either case, be rebutted by evidence of the fleeing from justice.

If there had been a demurrer directly to the indictment, the demurrer must, according to the opinion and decision of this Court, in *Watkins's case*, have prevailed; but after the general issue joined, (which admits evidence both of limitation and of fleeing,) the record presents a very different aspect; the *primâ facie* bar becomes a part of the issue to be tried; whereas, upon demurrer, it is an absolute bar; because, by demurrer, all replication is cut off, all further proceedings are stopped, and all further evidence excluded; whereas, upon the general issue, every matter of defence which the defendant may give in evidence may be rebutted by evidence on the part of the United States. In whatever way the defendant presents his defence of limitation, I think the United States have a right to rebut it, if they can, by evidence of his fleeing from justice.

THRUSTON, J., concurred.

MORSELL, J., dissented.

Messrs. Brent & Brent then contended, that nothing but a continuous fleeing from justice during the two years, could deprive the defendant of the benefit of the limitation. The reason of the exception of persons fleeing from justice was, that they thus prevented the United States from arresting them. This reason fails, if within the two years they might have been taken. The defendant's counsel also contended, that going from Washington to New York, openly and publicly, and there remaining at the defendant's

usual residence, was not a fleeing from justice, for he might as well be arrested in New York as in Washington. — v. *Smith*, 4 Day, 121.

Mr. Key, contra. There is no provision in the law for a return after fleeing. It is not analogous to the provisions of the statute of limitations in civil cases. It is a forfeiture of the privilege. The limitation can begin to run only from the commission of the offence, not from the return. The words of the act are, "Provided, that nothing herein contained shall extend to any person or persons fleeing from justice." When fleeing? not at the date of the statute; not at the time of the arrest of the offender; not at the time of finding the indictment; not merely while he was fleeing. Having once fled, he is a person fleeing from justice, and therefore he cannot claim the benefit of the limitation; he has lost it forever. If, in any case, a return would restore the benefit, it must be a surrender of himself into the hands of justice. Dwaris on Statutes, 743; 9 Law Library, 743.

The JUDGES (THRUSTON, J., absent,) could not agree to give the instruction which they had before given at the last term, upon the prayer of the defendant's counsel, respecting the fleeing from justice, and the return to the district, &c. (*Ante*, 38.)

Mr. Key then prayed the Court to instruct the jury, that if they should believe, from the evidence, "that the prisoner committed the offence charged in the indictment, and, within two years thereafter, fled from this district, with the intent to avoid detection or punishment for the offence, then the indictments not being found within two years after the offence was committed, is no defence to the prisoner."

It being known that THRUSTON, J., (who was absent,) was of that opinion, it was agreed by the counsel that if the chief justice should be of that opinion also, the instruction should be given, MORSELL, J., dissenting; and it was so given; CRANCH, C. J. observing, that the original instruction upon this point, which was given on the trial, at the last term, was not drawn up by him, and he was never entirely satisfied with it; but he had agreed to that part of it which admitted a return, after flight, to entitle the prisoner to the benefit of the limitation, from the time of the return. He had, however, been satisfied by the argument, last evening, that the prisoner, if he fled, forfeited the benefit of the limitation, or rather, was not protected by the limitation.

He considered it as analogous to flight in felony, &c., which forfeited the goods and chattels of the offender. If he fled, he must have been "a person fleeing," and therefore not within the protection of the act. See the Statute 7, W. 3, c. 3, § 5, and Foster, 272; 2 Hawk. c. 49, § 14, and Jac. Dict. tit. Fugam Fecit.

The jury having been out all Friday night, and until four o'clock, P. M., on Saturday, the 29th of April, sent the following question to the Court: "Must the jury infer a 'fugitive,' provided that they believe that the prisoner left this district with intent to avoid detection or punishment for the offence, but could, at various other periods, within two years, have been arrested in the United States?"

To which the COURT answered as follows: —

If the jury should be satisfied by the evidence, that the defendant within two years after the commission of the offence charged in the indictment, left this district with intent to avoid detection or punishment for that offence, he was a person fleeing from justice, although they should be also satisfied by the evidence, that he might at various other periods, within the two years, have been arrested in the United States.

Mr. W. L. Brent, for the defendant, requested the Court to add an instruction, that the circumstances of the defendant's appearing publicly in the United States, and actually coming to Washington, within the two years, were proper considerations for the jury, in forming their opinion of the intent with which the defendant left the district.

But the COURT (*nem. con.*) refused; because they thought it improper to give the jury, after they had retired, instruction upon any question not asked by the jury.

The jury could not agree, and were discharged by consent. The defendant had leave to withdraw his plea, and file a general demurrer to the indictment. (*Post.*)

JOSEPH WHITNEY v. THOMAS F. HUNTT.

A deposition taken in Louisiana before a person who calls himself "a commissioner duly appointed by the District Court of the United States for the Eastern District of Louisiana, under and by virtue of the Act of Congress, entitled, 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" and inclosed and directed to the clerk of this Court, may be read in evidence to the jury, without further authentication.

Extracts from the notarial book of a deceased notary in Louisiana, (proved by a witness who has the lawful possession of the book, and is authorized by the laws of Louisiana to certify the same,) may be given in evidence in this Court, to prove demand of payment of a promissory note, and notice to the indorser.

The Court will leave it to the jury to decide, from the evidence, where the indorser (the defendant) resided when the note fell due; and whether the post-office to which the notice was sent was the nearest post-office to the defendant's residence. And will instruct them that if the notice was put into the post-office and directed to the defendant at the post-office nearest to his residence, it was sufficient notice, and that the holder had used due diligence in that respect.

ASSUMPSIT against the indorser of three promissory notes of

Whitney v. Hunt.

Moses Duffy, dated at New Orleans on the 23d of June, 1824, and payable respectively, at one, two, and three years, each note being for the sum of \$363.81 $\frac{3}{4}$.

Upon the trial, *Mr. Hale*, for the plaintiff, offered to read, in evidence to the jury, the deposition of one Felix Percy, taken before T. W. Collens, who certifies himself to be "a commissioner appointed by the District Court of the United States for the eastern district of Louisiana, under and by virtue of the Act of Congress, entitled, 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States.'" The deposition was sealed up by the commissioner, and directed "to the clerk of the Circuit Court of the District of Columbia, for the county of Washington."

The Act of Congress referred to is the Act of the 20th of February, 1812, c. 348, [2 Stat. at Large, 679,] which authorizes the Circuit Court of the United States, in any district, &c., "to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary to take acknowledgments of bail and affidavits; which" "shall have the like force and effect as if taken before any judge of the said court," &c.

And by the Act of March 1, 1817, c. 30, (Pamphlet Laws, 212,) [3 Stat. at Large, 350,] entitled, "An Act in addition to an act, for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," it is enacted, "That the commissioners who now are, or hereafter may be, appointed by virtue of the act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, are hereby authorized to take affidavits and bail in civil causes, to be used in the several district courts of the United States; and shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the thirtieth section of the act entitled an act to establish the judicial courts of the United States."

By the Act of April 8, 1812, [2 Stat. at Large, 701,] the District Court of the United States, for the State of Louisiana, has the powers of a circuit court.

Mr. R. S. Coxe, for the defendant, objected to the deposition, and contended that the commissioners, under the Act of 1812, were only authorized to take depositions, &c., in causes depending in their own courts, or in the district courts, under the Act of 1817. That the appointment of the commissioner should be authenticated by the record; and the deposition should have been directed to this Court, and not to the clerk.

Whitney v. Hunt.

The COURT (MORSELL, J., *contra*,) permitted the deposition to be read. It went to prove the entries made in the notarial book of a deceased notary-public, in New Orleans, as to the demand of payment of the notes, and the notice given to the indorser, the defendant. By those entries it appeared that payment of the first note was demanded of the maker in person, and notice given in person to the defendant.

That the notice as to the second note, was by letter addressed to the defendant, "at Camp's Post-Office, near Iberville, Louisiana." And as to the third note, by letter addressed to the defendant, "in the Parish of Iberville, in Louisiana." Parol evidence was also offered that the defendant said that in regard to two of the notes, the plaintiff would be unable to prove notice to him; that he did not live in or near Iberville when the same fell due. He also mentioned Baton Rouge as a place in or near which he resided at the time. Evidence was also given that Iberville is a large parish in Louisiana, on both sides of the Mississippi; that on the east side it extends up to within about ten miles of Baton Rouge, and on the other side, opposite or nearly opposite Baton Rouge, and many miles below. That the defendant was an officer in the army, and was on public service during the time he resided up the Mississippi; and that the arsenal and military post of the United States was at or immediately in the vicinity of Baton Rouge, on the side of the river opposite to the town of Iberville, and several miles therefrom.

Whereupon the defendant's counsel prayed the Court to instruct the jury, that from the evidence aforesaid they could not infer that due notice was given to the defendant of the demand and refusal of the maker of said notes, to charge the indorser.

But the COURT refused to give the instruction as prayed, and instructed them that if they should be satisfied, by the evidence, that the defendant resided at or near Iberville, in Louisiana, at the time of the protest of the said note, payable two years after date, and that Camp's Post-Office, mentioned in the certificate of the deceased notary, as stated in the deposition of Felix Percy, was the post-office at Iberville, and that it was the nearest post-office to the residence of the defendant at that time, it was sufficient notice to the defendant, and that the holder had used due diligence in that respect. To which refusal and instruction the defendant excepted, as well as to the admission of the deposition of Felix Percy.

The jury found a verdict for the plaintiff, for the amount of the two first notes.

No writ of error was issued, and the judgment was satisfied.

GEORGE SUCKLEY v. HENRY C. SLADE.

The defendant had pleaded the statute of limitations in due time, and had also demurred to the whole declaration. The Court permitted him to withdraw his demurrer, and to let the plea of limitations remain.

DEBT upon a bond, conditioned to pay one third of the debt of Charles Slade.

The defendant had demurred to the whole declaration, and had pleaded, in due time, the statute of limitations of twelve years.

Mr. Jones, for the defendant, now moved to strike out the demurrer, leaving the plea of limitations to stand as his only plea.

Mr. Marbury, for the plaintiff, contended that the defendant could not plead and demur at the same time, and that therefore the whole pleading is a nullity and must go together, and then it would be too late to plead the statute, as the plea-day had long since passed. The pleading being inconsistent, there is no plea, nothing to which the plaintiff can reply. The statute must be pleaded at length, and by the rule-day; and cannot be amended. *Merryman v. State of Maryland*, 5 Har. & Johns. 425; *Wall v. Wall*, 2 Har. & Gill, 79; *State v. Green*, 4 Gill & Johns. 381; *State v. Boyd*, 2 Id. 365; *Waterfall v. Glode*, 3 T. R. 305.

Mr. Jones, in reply, cited the Statute of Limitations of 1715, c. 23, § 6, that no bond shall be good or pleadable if it be of twelve years' standing. *Carroll v. Waring*, 3 Gill & Johns. 491, 499; *Piatt v. Vattier*, 9 Peters, 415.

The COURT (CRANCH, C. J., doubting, not having had time to look into the cases cited, but inclined to concur with the Court,) permitted the defendant to withdraw his demurrer, and leave the plea of limitations, as a plea filed in due time.

W. G. W. WHITE v. BENJAMIN BURNS.

If new notes are taken by the holder of a note, and time given without the consent of the indorser upon the old note, he is discharged.

The maker of a note is a competent witness, not to prove its original invalidity, but the improper use afterwards made of it, and that time was given him without the consent of the indorser.

ASSUMPSIT, against the indorser of J. B. Gorman's note for one hundred dollars.

Mr. Bradley, for the defendant, offered to examine J. B. Gorman, the maker of the note, to prove that it was made to be dis-

counted at the Bank of Washington to take up a note for one hundred and five dollars with the defendant's indorsement then about becoming due at the Bank of the United States; but that it was discounted by the plaintiff, without the consent of the defendant, and that time was given to the maker, also without the defendant's consent.

Mr. Hoban, for the plaintiff, relied on the case of *Bank of the United States v. Dunn*, 6 Peters, 54, that the party to the note cannot be a witness to invalidate it.

The COURT (*nem. con.*) permitted *Mr. Gorman*, the maker, to be sworn and examined as to those facts.

Mr. Bradley then prayed the Court to instruct the jury that if they should be of opinion, from the evidence, that after the note upon which this action is brought, became due, the maker thereof, without the knowledge or assent of the defendant, made an agreement with the plaintiff to forbear any suit upon the said note, and in consideration thereof, paid to the plaintiff five dollars, and gave his two promissory notes to the plaintiff, one for \$45 at thirty days, and one for \$50 at sixty days, and also paid him the further sum of \$3.50; and that the plaintiff did, in fact, thereupon forbear any suit until after both the said notes had become due, the plaintiff did thereby discharge the defendant from liability upon the said note.

Mr. Bradley cited *Theobald on Principal and Surety*, 164, 184; *Hartley v. Brown and Nicholls*, 16 Johns. 70; 2 *Wheeler*, 212; *Woodhull v. Holmes*, 10 Johns. 240; *Skill and Hite v. Warren*, 15 Id. 270.

Mr. Hoban contended that the agreement to forbear was upon an usurious consideration, and, therefore, not binding upon the plaintiff; and, therefore, did not discharge the defendant; and prayed the Court to instruct the jury that if they should believe, from the evidence, that more than lawful interest was given for the forbearance of the two notes of fifty and forty-five dollars, such forbearance did not discharge the defendant, and he is liable upon the note of one hundred dollars.

But the COURT (*nem. con.*) refused to give the instruction asked by *Mr. Hoban*, and gave that asked by *Mr. Bradley*.

Verdict for the defendant.

MORDECAI FOY v. JANE TALBURT.

A justice of the peace has not jurisdiction of an action against an executor; and money paid by the defendant in such a case, while in commitment upon a *ca. sa.* issued upon the judgment of the justice, was money paid by duress, and may be recovered in an action for money had and received.

Rodbird v. Rodbird.

A judgment of a justice of the peace, being in part for a matter not within his jurisdiction, is void *in toto*.

The plaintiff cannot, in an action before a justice of the peace, recover upon a cause of action different from that stated in the warrant.

THIS was an action for money had and received, to recover money paid by the plaintiff while in commitment upon a *ca. sa.* issued upon a judgment of a justice of the peace against the plaintiff as executor *de son tort* of a living man, for damage done to land.

Mr. R. J. Brent, for the defendant, contended that money paid under valid process cannot be recovered, and cited 5 Wheeler, 89; Selden, 72; *Cobb v. Curtiss*, 8 Johns. 470; *White v. Aylesworth*, 9 Johns. 231, 232; *Philip v. Hunter*, 2 H. Bl. 414; *Brisbane v. Dacres*, 5 Taunt. 144, 160; *Marriot v. Hampton*, 7 T. R. 269; 1 Wheeler, 232; *Walker v. Ames*, 2 Cowen, 428; *Norfolk v. Gantt*, in the Court of Appeals in Maryland.

Mr. Bradley, *contra*, admitted the law as cited; but it does not apply to a judgment void because the Court which rendered it had not jurisdiction of the cause. It is not, then, valid process; but wholly void.

The jury having been sworn, the COURT, at the motion of *Mr. Bradley*, instructed the jury, that if, from the evidence, they should be of opinion that a judgment was rendered in this case by a justice of the peace against the present plaintiff as executor, and that upon such judgment a *ca. sa.* was issued, and the plaintiff committed to prison, and that while there he paid the said judgment and costs, then the said money was paid by duress.

Verdict for the plaintiff \$54.15.

ELIZA ANN RODBIRD v. EBENEZER RODBIRD.

A deed from the corporation of Washington upon the sale of a lot, for non-payment of the taxes upon it, is void unless the surplus of the proceeds of the sale, after deducting the taxes and expenses, was paid to the register of the corporation, or other person authorized by law to receive the same, with ten per cent. per annum, as interest thereon, computed from the expiration of two years from the day of sale until the actual payment of such surplus and the receiving the deed from the corporation.

If, at the time of the sale of a lot in Washington for non-payment of taxes, there was personal property thereon, of sufficient value to pay the taxes, the sale is null and void.

EJECTMENT, for lots Nos. 15 and 16, in square No. 620 in the city of Washington.

At the trial it was admitted that Absalom Rodbird, Jr., was seized in fee of the lots, on the 30th of December, 1829, and died

intestate in November, 1831, leaving the plaintiff's lessor his only heir at law. The defendant offered in evidence a deed in fee to himself from the corporation of Washington, duly executed and recorded, dated November 26, 1832, and offered evidence to prove that on the 30th of December, 1829, (the day of sale to the defendant,) there were due upon the said lots more than two years' taxes, and that no personal property was found, (liable to the payment of the same,) by the collector of taxes, who, however, had no recollection of going upon these particular lots or either of them for that purpose. That on the 30th of December, 1829, the lots in dispute were sold by the collector of taxes for the corporation of Washington, at a tax-sale, to the defendant, after public notice, &c., for the sum of \$18.82; the amount of the taxes and expenses (being \$17.71) were then paid by the defendant to the collector, and the residue, or surplus of the purchase-money, (being \$1.11,) was, on the 28th of March, 1832, paid to a certain Absalom Rodbird, Senior, claiming to be the legal representative of the aforesaid Absalom Rodbird, Jr.

Whereupon, at the prayer of *Mr. Marbury* and *Mr. Bradley*, for the plaintiff, the COURT (THRUSTON, J., *contrà*.) instructed the jury, that if they should believe from the said evidence, that the residue of the said purchase-money, after deducting the amount of taxes due on the said lots, and the expenses of sale, was not paid, (within ten days after the expiration of two years from the day of sale, or at any time after the expiration of the said ten days, with ten per cent. per annum as interest thereon, computed thereon from the expiration of the two years aforesaid, until the actual payment of such residue, and the receiving of the said deed from the corporation,) to the register of the corporation, or other person, authorized by law to receive the same, then the deed of the corporation to the said defendant is void, and the plaintiff is entitled to recover in this action.

The plaintiff's counsel further offered evidence to prove that there were persons living upon the lots, or one of them, and that, at the time of sale, there was upon the lots, or one of them, personal property of sufficient value to satisfy the taxes. Whereupon, at the prayer of the plaintiff's counsel,

The COURT (THRUSTON, J., *contrà*.) instructed the jury, that if, from the said evidence, they should be of opinion, that at the time of the said sale in 1829, there was personal property on the said lots, or either of them, of sufficient value to pay the said taxes, then the said sale of the said lots was null and void.

See the Act of Congress of the 15th of May, 1820, § 10, [3 Stat. at Large, 583,] "to incorporate the inhabitants of the city of Washington;" and the by-law of the Corporation of Washington, of October 13, 1823; Rothwell's City Laws, 161.

Van Ness v. Hyatt.

Verdict and judgment for the plaintiff.

The defendant took bills of exception, and sued out a writ of error, but did not prosecute it; and it was dismissed by the Supreme Court at January term, 1838.

JOHN P. VAN NESS v. ALPHEUS HYATT, JAMES SHIELDS, ANN BLANCHARD, CHARLES GLOVER and JANE his wife, MARY FRANKS, and JAMES MOORE.

A lease for ten years, not recorded, is good for seven years, under the law of Maryland.

The equity of redemption of a leasehold estate cannot be seized and sold under a *fiery facias*.

BILL in equity to redeem a mortgage of a leasehold estate; the complainant claiming as purchaser of the equity of redemption sold under a *fiery facias* against Shields, the mortgagor, upon a judgment for \$30.25, recovered before a justice of the peace.

The cause was set for hearing on the bill, answers, general replication, and exhibits.

The material facts appear to be as follows: On the 31st of December, 1818, William Cocking, being seized in fee of part of lot 12, in square 406, in the city of Washington, by indenture of that date, leased the same to the defendant, James Shields, for ten years from the 1st of January, 1819, at the rent of \$35 a year, clear of taxes, &c., and to build a two-story brick house thereon within twelve months, with leave to purchase the fee-simple at the end of the ten years, by paying \$375 and all arrears of rent.

This lease was duly acknowledged, but was never recorded.

Shields built the two-story house according to contract, and on the 23d of September, 1823, mortgaged the house and lot to the defendant, John Franks, to secure a debt of \$1,129.18.

On the 19th of August, 1825, Charles W. Botelior, a constable of Washington county, D. C., executed a deed to Mr. Van Ness, duly acknowledged and recorded, which recites a writ of *fiery facias*, stating a judgment on the 8th November, 1825, in favor of Mr. Van Ness against Shields for \$28.40, and \$1.27 interest and fifty-eight cents costs, commanding the constable to levy the debt, damages, and costs, "of the goods, chattels, lands, and tenements" of Shields; and that the constable "laid the same upon a certain lot of ground of him, the said James Shields, that is, upon the right, title, estate, interest, and claim of him, the said James Shields, therein lying and being in the city of Washington, and being part of lot No. 12, in square 406, beginning," &c., "as

the same was then occupied and held by the said Shields;" and on the 10th of July, 1824, exposed "the said part of a lot, &c., that is, all the right, title," &c., to public sale to the highest bidder, and that Mr. Van Ness became the highest bidder and purchaser thereof for \$54, and has paid the purchase-money to the constable, in consideration of which, and of five dollars paid, &c., the constable gives, grants, bargains and sells, transfers and assigns to Mr. Van Ness, his executors, administrators, and assigns, "the said part of a lot, that is, the right, title, estate, interest, and claim of him, the said James Shields therein, so as aforesaid taken on the said writ of *feri facias*, and so as aforesaid exposed to sale in virtue of said writ, with the improvements and appurtenances to the same belonging, unto the said John P. Van Ness, his executors, administrators, and assigns, and to their only proper use and behoof." There was no *habendum* in the deed. The recitals in the deed were admitted by the parties to be true, so that the judgment, execution, levy, and sale of Shields's right, the purchase by Mr. Van Ness, and the payment of the purchase-money, are admitted; provided, that such a right, as Shields then had, could be levied upon, taken, and sold, under such a *feri facias*.

On the 7th of May, 1825, Franks assigned his mortgage to the defendant, Alpheus Hyatt, for a full and valuable consideration; and on the 9th of May, 1825, Shields assigned to Hyatt all his equity of redemption, in consideration of \$200. There was no evidence, that, at the time of these assignments, Hyatt had any notice or knowledge of the judgment against Shields.

William Cocking died seized of the reversion in fee-simple, which descended to his two daughters, Ann Blanchard and Jane Glover, who, on the 16th of April, 1826, assigned to Hyatt all their right as heirs at law of the lessor, William Cocking, for a valuable consideration.

The execution recites, that "whereas on the 8th day of November, 1823, a certain John P. Van Ness, by the judgment of — recovered against a certain James Shields, the sum of \$28.41, debt, &c., which judgment was superseded by one James B. Holmead," the constable was commanded that of the goods and chattels, lands and tenements of the said James Shields, and James B. Holmead, he should cause to be levied the debt, &c.

The levying of the execution, and the sale under it, being before the assignment of the equity of redemption by Shields to Hyatt, there was nothing left for the assignment to operate upon, if that equity was lawfully levied upon, and sold under the execution; and that is the principal question in the case.

Mr. R. S. Coxe, for the complainant, cited the following authorities: *The King v. St. Michaels*, Doug. 630; *McCall v. Lenox*,

9 Serg. & Rawle, 312; *Jackson v. Hull*, 10 Johns. 481; *Monell v. Lawrence*, 12 Id. 521, 529; *Waters v. Stewart*, Caines's Cases in Error, 47; *Wilson v. Troup*, 2 Cowen, 230; *Hitchcock v. Harrington*, 6 Johns. 294; *Groton v. Buxborough*, 6 Mass. 50; *Bolton v. Ballard*, 13 Id. 229; *Barkhamstead v. Farmington*, 2 Conn. Rep. 600; *Collins v. Torry*, 7 Johns. 278; *Runyan v. Mersereau*, 11 Id. 538; *Jackson v. Dickinson*, 15 Id. 309; *Coles v. Coles*, Id. 319; *Titus v. Neilson*, 5 Johns. Ch. Rep. 452; 5 Gwillim's Bac. Ab. 16, tit. Mortgage, C.; *Harrison v. Eldridge*, 2 Halst. 392; *Casborne v. Scarfe*, 2 Atk. 603; 2 Fonb. 262, note; *Jackson v. Willard*, 4 Johns. 41; *D'Arcy v. Blake*, 2 Sch. & Lefroy, 387; *Jackson v. Bronson*, 19 Johns. 326; *Campbell v. Pratt et al.* 9 Cr. 459.

Mr. Morfit, contra, cited *Harding v. Stevenson*, 6 Har. & Johns. 267; *Warren v. Childs*, 11 Mass. 226; *Metcalf v. Scholey*, 5 B. & P. 461; *Wilkes v. Ferris*, 5 Johns. 335, 343; *Scott v. Scholey*, 8 East, 467; *Shirley v. Watts*, 3 Atk. 200; *Burden v. Kennedy*, Id. 379; *Lyster v. Dolland*, 3 Bro. C. C. 480, and 1 Ves. Jr. 431; *Warren v. Howe*, 3 Dowl. & Ry. 494; S. C. 2 B. & C. 281; *Cadogan v. Kennett*, Cowp. 432; *Plunket v. Penson*, 2 Atk. 292; *Sir Ch. Cox's case*, 3 P. Williams, 342; *Cattel v. Warwick*, 1 Halst. 192; Statute of Massachusetts, 1 March, 1799; *State v. Laval*, 4 McCord's South Carolina Rep. 341; *Roads v. Symmes*, Ohio Condensed Rep. 141; *Phelps v. Butler*, Id. 331; *Denton v. Livingston*, 9 Johns. 99, 100; *Bogart v. Perry*, 1 Johns. Ch. R. 56, 57; *Davis v. Maynard*, 9 Mass. 235; *Punderson v. Brown*, 1 Day, 93; *Scripture v. Johnson*, 3 Conn. Rep. 211; *Boring's Lessee v. Lemon*, 5 Har. & Johns. 223; *Perry v. Coates*, 9 Mass. 537; *Marine Ins. Co. v. Weeks*, 7 Mass. 438; *Ingals v. Lord*, 1 Cowen, 240; Com. Dig. Execution, C. 4; *Piquet v. Swann*, 4 Mason, 465; Bac. Ab. Execution, C. 4.

CRANCH, C. J. The first question which presents itself, is,

1. Did any and what legal estate pass from Cocking to Shields, by the lease of December 31, 1818, purporting to be a lease for ten years, but not recorded.

By the Maryland Act of 1766, c. 14, § 2, it is enacted, that "no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass, or take effect, except the deed or conveyance, by which the same shall be intended to pass or take effect, shall be acknowledged," &c., "and be also enrolled in the records of the same county," &c., "within six months after the date of such deed or conveyance."

At common law the lease would be good for ten years; and under the English registry acts, it would be equally good between

the parties. *Jones v. Gibbons*, 9 Ves. 407; and the policy of the Act of Maryland, 1766, c. 14, does not seem to require that the conveyance, as between the parties, should be void. It says that no estate for above seven years shall pass, but it does not say that an estate for seven years shall not pass by a deed purporting to be for ten years. Statutes, restricting common-law rights, should be construed strictly. The statute does not make void the deed; it only limits its operation to seven years. Deeds must be construed most strongly against the grantor. He had power to make a lease for seven years without recording it. To give this lease the same effect, is to give to the statute all the effect which is indicated by its spirit. I think, therefore, that the lease was good for seven years, and passed a legal estate to Shields for that term. His legal estate continued, therefore, until the 1st of January, 1826; or rather until the 23d of September, 1823, when he mortgaged it to Franks by an assignment of that date. After January 1, 1826, when the legal estate expired, Franks, the mortgagee, had still an equitable interest in the house and lot for the residue of the ten years, with the privilege of buying in the fee-simple at the expiration of that term by paying three hundred and seventy-five dollars, and all arrears of rent; and Shields had a right to redeem the property from Franks by paying the mortgage debt.

In the meantime, however, namely, on the 7th of May, 1825, Franks had assigned his mortgage to the defendant, Hyatt, for a valuable consideration; and Shields had, on the 9th of May, 1825, assigned to Hyatt his equity of redemption; and on the 16th of April, 1826, Hyatt purchased the reversion in fee from the heirs of Mr. Cocking; so that Hyatt obtained a complete title in fee, unless intercepted by the *feri facias* and sale, in the suit of *Van Ness v. Shields*.

That sale was made on the 10th of July, 1824, before Franks and Shields had assigned their respective rights to Mr. Hyatt. Under that sale Mr. Van Ness claims to be clothed with all the rights which Shields had, on that day. What were they? His right of redemption, namely, to redeem the residue of the term which had, at most, only five and a half years to run. This was the whole of his right as mortgagor. His right to purchase the reversion is a mere right in equity founded upon a contract. It never was any part of his legal estate in the land. It was a mere equity. All those cases, therefore, which support the doctrine that the mortgagor is to be considered as the legal owner of the estate until foreclosure, do not apply to the right to purchase the reversion. That is a mere equity which, all the books agree, cannot be touched by *feri facias*.

2. The second question is, whether an equity of redemption can be seized, appraised, and sold under a *feri facias*?

Upon this question the decisions of the courts, in the several States, have been various and conflicting.

The present case, however, must depend upon the law of Maryland, which is the English common law, as far as it was applicable to that State, and to this part of the District of Columbia on the 27th of February, 1801.

In England, it is believed, no case can be found, in which an equity of redemption has been seized and sold under a *feri facias*, or extended upon an *elegit*.

In the case of *Plunket v. Penson*, 2 Atk. 292, (decided in the year 1742,) Lord Chancellor Hardwicke said, "I should be glad to be informed whether there is any instance where an equity of redemption has ever been held liable to the execution of a bond-creditor in the lifetime of the mortgagor. To which the counsel in this case made answer, they could not recollect any instance when it had been so held.

In the case of *Sir Charles Cox's Creditors*, 3 P. Williams, 342, (decided in 1734,) Sir Joseph Jekyll, Master of the Rolls, said, "Wherefore this right of redemption, being barely an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable among all the creditors *pro ratâ*;" and it was so decreed.

The fact, that a right of redemption after forfeiture cannot be enforced at common law, is conclusive evidence that it is not a legal right, nor a legal estate.

In *Lyster v. Dolland*, 3 Bro. C. C. 478, (1 Ves. Junior, 431, S. C.) the mortgagee filed a bill for foreclosure; pending which he brought suit at law on the bond given for the mortgage-money, and also an ejectment upon the mortgage, and recovered judgment upon the bond, and got possession by the ejectment; and then took the mortgaged premises in execution by *feri facias* upon the judgment on his bond, and the sheriff sold the same to a person in trust for the mortgagee. The personal representatives of the mortgagor brought their bill to redeem, there having been no decree of foreclosure.

The defendant contended that the sale under the *feri facias* was equivalent to a foreclosure.

But the chancellor decided against him, and permitted the plaintiffs to redeem, "on the ground that an equity of redemption was not liable to be taken in execution."

The question was afterwards, in the case of *Scott v. Scholey*, 8 East, 481, fully argued, and solemnly decided by the Court of King's Bench.

Lord Ellenborough, in delivering the opinion of the Court,

stated the question to be, "Whether an equitable interest in a term of years can be sold under a *feri facias*," and said, "the sheriff's authority is derived under a writ by which he is commanded to cause to be made, of the goods and chattels of the defendant, the sum recovered ; and which sum is, of course, to be made by the sale of the things taken under the execution. If the sheriff should not be able, before the writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning that the goods remain in his hands unsold for want of buyers ; upon which another writ issues, commanding him to expose for sale the goods so remaining in his hands unsold. The language of these writs and return evidently imports that the goods and chattels which are the objects of them, are property of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of the creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, both of which are capable of delivery to a vendee, has been always held to answer the description of the writ, and to be salable thereunder. Dyer, 363, a. But no single instance is to be found in the history and practice of the courts of common law, in which an equitable interest, in a term of years, has ever been recognized as saleable, (seizable, of course, it cannot be,) under a *feri facias*."

And in p. 485, he says, "The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value, than attend sales of any other description of property ; and not only without any legal means of delivering a present possession of the thing sold, but, in general, without having even the type or instrument of any legal interest whatsoever, present or future, in the subject of such sale, to exhibit to the sight, or to deliver to the hands of a purchaser. It has indeed been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be salable under an execution, that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected, and withdrawn from the legal claims of every creditor. But the inconvenience, in the case put, does not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances

as stood in the way of his common-law remedy by execution ; or he might have a decree for the sale of the mortgage-term itself in satisfaction of his rights as an execution creditor. *Shirley v. Watts*, 3 Atk. 200, is an authority for this purpose, as is also the case of *Burdon v. Kennedy*, 3 Atk. 739. In the case of *Lyster v. Dolland*, reported in 3 Br. Ch. Ca. 480, and 1 Ves. Junior, 431, Lord Thurlow was, at last, of opinion that an equity of redemption of a term could not be taken in execution, though, at first, under an apprehension that the language of the tenth section of the statute of frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing of the trusts of chattel-interests ; affords a strong argument that those interests were intended to continue in the same situation and plight, in respect of executions in which both leasehold, and freehold trust-interests equally stood, prior to the passing of that statute."

The same point was decided by the Court of Common Pleas in the case of *Metcalf v. Scholey*, 5 B. & P. 461.

In the case of *McCall v. Lenox*, 9 Serg. & R. 312, Duncan, J., said, "In England the equity of redemption is not extendible on an execution."

In *Waters v. Stewart*, Caines's Ca. in Error, 47, Spencer, J., said, "I take it to be well settled that in England there cannot be a sale of an equity of redemption upon a mortgage for a term of years." And Kent, J., said, "I admit that under the English law, an equity of redemption cannot be sold by process of law."

In the case of the *State v. Laval*, 4 McCord, 341, Nott, J., said, "That is what is called an equity of redemption ; and I take it to be a well-settled rule of law, that a mere equity is not the subject of a levy and sale under an execution. A *fiery facias* can operate only on a legal estate ; and it is confounding all legal distinctions, to say that an execution can be levied on an equity of redemption.

"It is said that in Massachusetts, Connecticut, and New York, an equity of redemption may be levied upon and sold under a *fiery facias* from a court of law. I have not looked into those cases because the question is quite unimportant as it regards the case now under consideration. For our Act of 1791 expressly provides that the fee shall continue in the mortgagor ; and that the mortgage shall be considered only as a pledge for the security of the money ; and the mortgagor is entitled to redeem, even after the time stipulated, by the parties, for redemption, is past. It is true that the act of 1797, does call this, in conformity with the language of the English books, an equity of redemption ; but it

is clearly a misnomer. The right to redeem is, unquestionably, a legal, and not an equitable right. The mortgagor has the legal estate, because it is so expressly declared by the act. He has a legal right to redeem because that is as expressly given," "and because the aid of the court of equity is not necessary to the exercise of it."

In the case of *Roads v. Symmes*, Ohio Rep. condensed, 141, the COURT said: "There is no principle upon which it can be held that a judgment may bind an interest which cannot be seized and sold to satisfy it." "The liability of equitable interests in land to be seized and sold upon execution, as land, has never been recognized by this Court, as existing either under the territorial or State governments."

And in *Burdon v. Kennedy*, 3 Atk. 739, Lord Chancellor Hardwicke said: "Where an execution by *elegit* or *fieri facias* is lodged in a sheriff's hands, it binds goods from that time, except in the case of the Crown, and a leasehold estate is also affected from that time;" "but in the present case, here is only an equity of redemption, in the debtor, in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee."

A number of cases have been cited to show, that in several of the States, namely, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, South Carolina, and Ohio, the courts have decided that an equity of redemption may be sold under a *fieri facias*; but it will be found, upon examination of those cases, that they rest upon the construction given by those courts to the words of the several statutes, subjecting real estate to execution, and of the statute of 5 Geo. 2, c. 7, which has been differently construed in different States; and none of those cases can be considered as in any manner affecting the law of Maryland as it existed on the 27th of February, 1801, when it was adopted by Congress as the law of this part of the District of Columbia.

In no case had the courts of Maryland, before the 27th of February, 1801, ever decided that an equity of redemption could be seized and sold under a *fieri facias*. On the contrary, by the Act of 1794, c. 60, § 10, it is provided, that, "Whereas, it often occurs that persons, against whom judgments and decrees are obtained, hold and possess, or claim lands, tenements, or hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy either at law or in equity,

"Be it enacted, that, in such cases, it shall and may be lawful for the chancellor, on application, to decree a sale of such equitable interest for the benefit of the creditor or creditors applying for the same; and the purchaser or purchasers thereof, under

such decree, shall, upon payment of the purchase-money, be entitled to an assignment of such equitable interest, to be made by the trustee making such sale, and shall be entitled to such remedies, both in law and equity, against all persons, and in all cases, as the person could or might have had, whose title he, she, or they may claim by virtue of such purchase."

And by the Act of 1810, c. 160, it is enacted, "that it shall and may be lawful for any sheriff or other officer to whom any writ of *feri facias* shall be directed, to take, seize, and expose to sale, any equitable estate or interest which the defendant or defendants named in such writ of *feri facias* may have or hold in any lands, tenements, or hereditaments;" and it provides for an assignment thereof, by the officer, to a purchaser, who is thereby entitled to such remedy against all persons, and in all cases, as the person, whose title he may so purchase, could have had.

This act was passed after the separation of this part of the District from the State of Maryland, and therefore was never in force here, but it shows what the law of Maryland was before the passing of the act, namely, that an equitable estate or interest in lands could not be seized and sold under a *feri facias*.

It seems clear, therefore, that such was the law of Maryland on the 27th of February, 1801, and such must still be the law unless it has been altered by some Act of Congress. But it is said that it has been altered, as to writs of *feri facias* issued upon the judgment of a justice of the peace, by the Act of Congress of the 24th of June, 1812, § 16, [2 Stat. at Large, 755,] by which it is enacted, "That upon a *feri facias* issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such *feri facias*, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant."

The execution, in the present case, did not issue out of the office of the clerk of the county of Washington, but was issued by the magistrate himself, and is, therefore, not within the letter of the act of 1812.

But it is said, that by the third section of the Act of the 1st of March, 1823, [3 Stat. at Large, 743,] "to extend the jurisdiction of the justices of the peace," the justice of the peace is "authorized to issue execution or *feri facias* in the same manner as executions are now issued by the clerk of the Circuit Court of the District of Columbia;" and it is supposed, that because the justice is to issue them in the same manner, they are to have the same effect. This does not seem to be a necessary consequence; but, admitting that it is, yet the *feri facias*, issued by the clerk,

never bound an equity of redemption. It cannot be contended that it is goods and chattels; and it was not lands and tenements; for the words "lands and tenements" have always, in Maryland, been understood to refer to the legal estate; and such has always been the construction given to the words "lands, tenements, and other hereditaments, and real estates," in the English statute of 5 Geo. 2, c. 7, § 4, which are full as broad as the words "lands and tenements." They have, as we have seen, never been construed, in Maryland, as extending to an equity of redemption. The words "rights and credits" mean legal rights and credits only; such as might be attached and condemned under the attachment laws; not mere equitable claims or interests. But the third section of the Act of March 1, 1823, does not authorize the justice who rendered the judgment, to issue the execution; it authorizes any other justice to issue it upon a copy of the judgment. It is the 13th section of the act which gives power to a justice to issue execution upon his own judgment; and that section has no allusion to the executions formerly issued by the clerk; it adds nothing to the ordinary effect of a *fiери facias* at common law, and it expressly excepts certain articles from seizure. The 9th section gives the justice power to issue a *ca. sa.* or *fi. fa.* upon a *supersedeas*, (which is a judgment confessed by the debtor, with a surety, payable in six months,) which was the case here; and this section also has no reference to the executions formerly issued by the clerk, and adds nothing to the common-law effect of a *fiери facias*.

The 3d section declares that "no judgment rendered before a justice of the peace shall have the effect to create any lien upon real estate."

The reason of this provision, no doubt, was the difficulty of ascertaining the extent of such incumbrances from the judgments of twenty or thirty individual magistrates, whose memorandums, or even docket-entries, are not matter of record, and are liable to be lost; and no purchaser of land in the district could be sure that it was free from incumbrance. When the magistrates were bound to certify all their judgments to the clerk of the court, and when all executions issued from his office, there could be no difficulty, as that office would, at once, furnish all the necessary information. Executions issued by justices of the peace, and levied upon lands, are liable to the same objection. They are made returnable to the justice, and nothing more is heard of them. They are not matter of record, and if returned, are liable to be lost; and before a title can be certified to be good, the files of every justice in the county must be examined. No deed is necessary from the officer who levies the execution, and makes

the sale. The legal estate is vested in the vendee, by operation of law. (*Boring's Lessee v. Lemon*, 5 Har. & Johns. 223.) The spirit of the act of March 1, 1823, is therefore against extending the operation of a magistrate's execution beyond its legal common-law effect, which I think is limited to the sale of legal estates and legal interests.

The *feri facias*, in the present case, was issued upon a *superse-deas*, and must, therefore, have been issued by virtue of the 9th section of the act, which simply authorizes the magistrate to "issue execution by way of *capias ad satisfaciendum* or *feri facias* against the principal debtor and his sureties, or against either of them, after the expiration of the time so mentioned in the said *superse-deas*." There is nothing, in this section, added to the common-law effect of the *feri facias*. The only power given, is "to issue execution by way of *capias ad satisfaciendum*, or *feri facias*."

I am, therefore, of opinion that the execution and proceedings in the case of Van Ness against Shields, did not in any manner affect the equity of redemption which Shields had in the mortgaged premises; and that he had a good right to assign it to Mr. Hyatt on the 9th of May, 1825.

If the equity of redemption was not affected by that execution, *a fortiori* the right to purchase the fee-simple within the ten years, which was a mere covenant-right, could not be affected.

Mr. Hyatt had completed his title in fee before Mr. Van Ness filed his bill, and the fact, that he was a judgment-creditor, gave him no lien or priority to redeem the term, or to purchase the fee-simple, as against Mr. Hyatt, who was a *bonâ fide* purchaser for a full and valuable consideration without notice of that judgment. Whether he had, or had not notice, however, I deem to be of no importance.

I am clearly of opinion that the bill ought to be dismissed with costs.

MORSELL, J. This is the case of a bill filed to redeem a mortgage of a leasehold estate; the complainant claiming a right to redeem as a creditor, by judgment, and under a sale by *fi. fa.* against the mortgagor.

The facts to show the ground of the right, in substance, are : That on the 31st of December, 1818, William Cocking leased to James Shields, part of lot 12, in square 406, in the city of Washington, for ten years from the 1st of January, 1819, at \$35 a year, clear of taxes, &c., and to build a two-story brick house thereon within twelve months, with leave to purchase the fee-simple at the end of the ten years, by paying \$375 and all arrears of rent. This lease was duly acknowledged, but never

recorded. Shields built the two-story house according to the contract. On the 23d of April, 1823, Shields mortgaged the house and lot to John Franks, to secure a debt of \$1,127.18, to be paid on the 31st of December, 1828. On the 8th of November, 1823, Van Ness, the complainant, obtained a judgment against Shields for \$28.40 debt, and \$1.27 interest, and fifty-eight cents costs, rendered in his favor by a justice of the peace, which judgment was superseded. On the 10th of June, 1824, a *fi. fa.* was issued upon the judgment, by a justice of the peace, which was levied by Botelor, the constable, upon the lot of ground above described as then in possession of and occupied and held by said Shields, for all the right, title, interest, and claim of said Shields, (particularly describing the premises.) On the 10th of July, 1824, after due notice being given of the same, he, said Botelor, exposed the same to public sale, with the improvements thereon, that is, all the right, title, estate, interest, and claim of him, the said James Shields, therein, so as aforesaid taken in execution on the said writ. John P. Van Ness became the highest bidder and purchaser for \$54, and has since paid the purchase-money.

On the 19th of August, 1825, Botelor, as constable, made his deed to Van Ness, reciting all these circumstances, and conveying the said premises and interest to Van Ness, which are, by the admission of counsel, agreed to be true; which deed was duly recorded, &c.

On the 7th of May, 1825, Franks assigned his interest in the mortgage to Alphæus Hyatt, for a valuable consideration.

On the 9th of May, 1825, Shields assigned to Hyatt all his equity of redemption, in consideration of \$200.

Cocking died seized of the reversion, in fee-simple, which descended to his two daughters, Ann Blanchard and Jane Glover; who, on the 16th of April, 1826, assigned to Hyatt all their right as heirs at law of the lessor, William Cocking, for a valuable consideration.

The bill states that a negotiation had taken place between the complainant and the said Cocking in his lifetime, upon the subject of paying the sum of money agreed on for the fee, but this is denied, and there is no proof of the fact, that it was continued afterwards with Charles Glover, who married one of the heirs of Cocking; and the correspondence, marked exhibit 2 and 3, are filed to prove it, which I think they do prove.

It also charges notice of the judgment, *fi. fa.*, and sale, by Hyatt before his purchase of the equity of redemption of Shields; and although the fact of personal notice is not admitted in the agreement of counsel, yet the circumstances are so strong to prove it, that the conviction cannot easily be resisted. The public notice

given of the sale, the publicity of the sale itself, and the other circumstances in the case, seem to me abundantly sufficient to preserve any rights which Van Ness might have had against a subsequent purchaser of the redemption.

The bill also charges "that he has been always ready and willing to redeem the same, and to pay the said sum of \$375 with interest and arrearages to said Cocking and his representatives, and to pay to the said Franks in his lifetime, and his representatives since his death, the amount really due of said consideration-money in the mortgage to him from Shields, and is now ready and prepared so to do; but that they have refused," &c.

The case as to the amount claimed, is not of much importance, but the principles, upon which a correct decision must rest, are of very great interest and difficulty.

As to the interest which Shields took under the unrecorded deed, there is no difference in opinion between the Chief Judge and myself; that it was a good lease for seven years, or rather that it gave him a legal interest in the property for seven years, and an equitable interest for the residue of the ten years, together with rights, under the covenant, to the fee, which a court of chancery would enforce. I shall, therefore, say nothing more on that point.

Shields, then, according to the facts in the case, at the time Van Ness obtained his judgment, and caused his *fi. facias* to be put into the hands of the officer, held the equity of redemption in the unexpired part of the term; was in the actual possession and occupation of the premises; and also had, by the condition in the mortgage, an unexpired period of time till the 31st December, 1828, to pay the money, and save the forfeiture; with the further right, secured to him by covenant upon payment of the sum mentioned in the lease, of purchasing the fee.

In the objections, offered to the recovery in this case, it has been supposed that the principal question in the case was, whether an equity of redemption, in a term of years, could be seized, appraised, and sold under a *fi. fa.* issued on the judgment of a single magistrate, and which, so far as this question is concerned, is supposed to be like any other common-law judgment. I think the real question in the case, is, whether Van Ness, the complainant, in virtue of his judgment and *fi. facias*, and sale under it, is not such a creditor and legal assignee as to be entitled, against the defendant, a subsequent purchaser of the equity of redemption, to the preferable right to redeem, and to the benefit of the covenant for the purchase of the fee, as an incident to the leasehold interest. I will, however, offer my thoughts upon the question, whether an equity of redemption in a term for years, can be seized, appraised, and sold under a *fi. facias*.

A great number of English authorities have been referred to, for the purpose of proving that it cannot be done in England. I agree that it is so settled in England; the reason, assigned by the English authorities, is, that the *fi. fa.* is a common-law process; that the language of these writs and return, imports that the goods and chattels which are the subject of them are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, as also in respect of the instrument by which the term is created and secured, both of which are capable of delivery to a vendee, has been always held to answer the description of the writ, and to be salable thereunder; but no single instance is to be found in the history and practice of the courts of common law, in which an equitable interest in a term of years has ever been recognized as salable, (seizable, of course, it cannot be) under a *fi. fa.*

When this distinction was taken between a legal and equitable interest in lands, and the principle established, it was at a very early period; and when their courts decided that "an equity of redemption was nothing in the eye of the law." See 2 Wilson's Rep. 86. It is not wonderful, when such was the view, that they should think it was not tangible; could not be seized and sold; but since that day the law of mortgages in England has undergone, (perhaps,) a greater change than the law on any other legal subject; almost total. It is not deemed necessary to trace particularly the change as to time or in all the particular instances. One or two shall be stated, which will show that I am not mistaken.

To tenant by the curtesy, Lord Coke says, (and such is now the law,) four things are requisite to give an estate by the curtesy, namely, marriage; seizin of the wife; issue; and death of the wife. Yet, it is a principle as well settled as any other in England, that a husband is entitled as tenant by the curtesy, of an equity of redemption.

Again, in a very modern case of settlement, decided by one of the most enlightened judges that ever sat on the English bench, I mean Lord Mansfield, in stating the law on the subject, he says, "If the estate on which a pauper resides, is substantially his property, that is sufficient, whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only security. It is an affront to common sense to say the mortgagor is not the real owner."

If, then, such is the character and interest of the mortgagor, the reasons for the principle no longer exist. There is, however, still felt strange veneration for an old principle which has nothing, at this day, but the most naked, sheer form left to support it.

As to its not being tangible and capable of manual seizure, I think I have shown enough to prove there is but little, if any, force in the objection.

In the language of a learned judge in Maryland, "the right itself, whether legal or equitable, is not tangible;" but the land is; and, by the sale, the interest of the party, either legal or equitable, may well pass; and if the party in possession will not give it up, the purchaser is driven to his ejectionment; and if only equitable, to get possession he may resort to a court of equity, where, if the sale under the *fiery facias* passed the right, he would not only obtain the possession, but the legal estate also. Would it not be highly unjust that a debtor, in possession of, and using and enjoying the property as owner, under cover of such a sheer form, should be sheltered from the remedy of his creditor, awarded to him by the law as a means to realize the fruits of his judgment. However it may be in England, this empty form has not been regarded as a sufficient objection by the courts of this country, with the exception of some few of the States, amongst whom I shall endeavor to show Maryland is not one.

It will appear, from decided cases, that Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, South Carolina, and Ohio, have determined that an equity of redemption may be sold under a *fiery facias*. It is said that those States have particular statutes on the subject, authorizing it. Whether this is so or not I cannot tell, having no opportunity of examining their statutes; but so far as I have ascertained, they are considered as only declaratory of what the law was before.

But, how was the law of Maryland as it existed on the 27th of February, 1801?

It is supposed, that in no case had the courts of Maryland ever decided that an equity of redemption could be sold under a *fiery facias*. On the contrary, that the two Acts of 1794, c. 60, and 1810, c. 160, show what the law of Maryland was before, namely, that an equitable estate or interest in land could not be seized and sold under a *fiery facias*.

I have very much misunderstood the course of legal decisions in Maryland, if their courts have not, in effect, held that such an interest was subject to a *fiery facias*. The Act of 5 Geo. 2, c. 7, which passed in the year 1732, made houses, lands, negroes, and other hereditaments and real estate liable to the payment of all debts; and subject to the like remedies and proceedings in any

courts of law or equity that personal estate were. I can perceive nothing in the terms of this law, that necessarily confines the remedies to cases only of strictly legal interests in lands. The terms hereditaments and real estate are very comprehensive. It is such an interest as will descend and may be inherited by the heirs at law; and may be bargained and sold by the mortgagor.

The Court has decided that the mortgagor of shares in an incorporated insurance company, was entitled to vote on them, and in some other cases, I think, that the mortgagor is considered as the real and substantial owner. As to the inference which has been drawn from the Acts of 1794 and 1810, I think it will appear to be incorrect, and that their provisions were principally intended to affect equitable interests only in lands existing in contract and choses in action only,—a distinction which I admit to exist. The first act is intended to enlarge the powers of the high court of chancery, and the powers given are nothing more than such a court had before as to cases of equity of redemption.

So with respect to the Act of 1810; it was designed to remove all doubts as to the cases of equity of redemption, and to extend it to all other equitable interests.

To justify the inference drawn from those two statutes it must be supposed, that there is no difference between an equity of redemption with actual possession, in which the party has bargained and sold his legal interest conditionally, and other equitable interests or claims in land by contract or chose in action only and where he never had the legal interest. I think otherwise. I have never supposed that a *fiery facias* could be levied upon a mere chose in action. This, I agree, would be such an incorporeal hereditament as could not, without the provisions of the statutes, be affected by a *fiery facias*.

I will now refer to the Maryland authorities, or as many of them as I have been able to meet with, and I think it will appear from them that I am fully borne out in the position I have laid down.

The first is the case of *Campbell v. Morris*, in 1797. In this case the question was raised and fully argued by the most eminent lawyers at the bar of the General Court, whether an attachment, which was a common-law process, could be levied upon an equity of redemption in lands, and it was very ably argued and shown that there was no distinction, as to this matter, between an attachment and a *fiery facias*. The Court of Appeals of Maryland decided that it might be done, and ordered condemnation; on which judgment a *fiery facias* was taken out, and the lands seized and sold, and Campbell became the purchaser.

He afterwards filed his bill to redeem, in this Court, which was

opposed by some other who claimed to have the right ; and an appeal was prosecuted from this Court's decision, to the Supreme Court, where the same question was raised and decided. Judge Johnson, in delivering the opinion of the court, says, "Campbell claimed as a purchaser at sheriff's sales under an attachment of the interest of the mortgagors, filed his bill for redemption, and the court decreed that he be permitted to redeem on payment," &c. The attachment was levied on the equity of redemption existing in those mortgagors ; and the decision of this court, in supporting his rights, was placed upon the decision of the courts of Maryland (in which the land then lay) which maintained the validity of an attachment levied upon an equity of redemption.

In this case, it will be observed, the process of attachment was a common-law process ; the judgment of condemnation was a common-law judgment, and the *feri facias* was also such. The Supreme Court say that a *feri facias*, issuing on such a judgment, may be levied on an equity of redemption, and a valid sale may be made under it ; and that the purchaser, in virtue thereof, is to be considered such an assignee of the equity of redemption as to be entitled, on a bill filed, to redeem. If it be objected, however, to this case, that it is not authority for the proposition as generally laid down, because of the comprehensive terms used in the attachment-statute, yet the objection will not hold as to the particular case before the Court, as it will hereafter be shown, when the terms used in the two statutes are to be compared. It will then appear to be a full and conclusive authority.

The next which I will refer to is the case of *Purl v. Duval*, in Prince George's County Court, decided in 1820 ; reported in 5 Har. & Johns. The case was an action of ejectment brought in the county court by Purl against Duval, in which the question was made to the court, "When the judgment was obtained under which the land was sold, there was no deed for the land vesting a legal title in Purl, who had no interest therein until two years after the return of the *feri facias* under which the land was seized and sold ;" in other words, the defendant, in the case in which the *feri facias* had issued, had, at the time, only an equitable interest in the land which was seized and sold under the *feri facias*. The plaintiff prayed the court to direct the jury that the evidence so offered by the defendant, (which was his judgment, *feri facias*, sale under it, and deed from the sheriff, of an equitable interest,) was not sufficient to sustain the issue on his part ; and that the title by him set up under the judgment and the proceedings under the same, the sale of the sheriff, and the deed executed by him to said defendant, is not a good and valid title in law ; which opinion the court," (Johnson, C. J., Key, and Plater, A. J.,) "refused to

give; but on the contrary were of opinion, and so directed the jury, that the plaintiff, on the preceding facts, if found to be true by the jury, was not entitled to recover."

The *fieri facias*, in the case above recited, was laid in the year 1806, so that it was not even pretended that the act of 1810 had any bearing on the question made in the case. This case was carried up to the Court of Appeals, but went off, in that court, upon some other point. The decision of the county court was not disturbed, so that I think it cannot be denied that this is an authority on the very point. The judge who delivered the opinion of the court, was, at that time, one of the judges of the Court of Appeals, and afterwards made the chancellor of the State. He stood, deservedly, very high as a judge.

The next case which I will refer to, and the last, is the case of *Ford et al. v. Philpot*, same book, decided in 1821. In this case the question is made, "How far the interest which a mortgagor had in lands, mortgaged by him, was, before the Acts of 1795 and 1810, liable to be attached, condemned, and sold, under a *fieri facias*."

The same learned Judge, Johnson, in delivering the opinion of the court, after stating that the mortgagor is considered the substantial owner of the property mortgaged, that the debt due is all the mortgagee and those claiming under him can demand, and that the legal estate is in the mortgagee merely to secure the payment of the debt, and, that effected, the mortgagor must be restored to his original condition, the unfettered owner; that there is no necessity to detail the extent of the interest of the mortgagor after the time limited for the payment of the debt has elapsed; he says, "It may suffice to say that, except no right of dower can arise (and for this exception no substantial reason can be given, and no longer exists,) on the mortgagor's interest, he is capable of transferring or vesting his interest at his own pleasure; nor can he be deprived of this capacity so long as the right of redemption exists." Again, in another part of the same opinion, he says, "It appears, in itself, but just, that the interest, which a mortgagor has in the property mortgaged by him, should be liable, as well at law as in equity, for his debts; and there appears no force in the objection, that it is not at law subject to a *fieri facias* because it is not tangible; for the right itself, whether legal or equitable, is not tangible; but the land is;" &c., as I have quoted from him in another part of this opinion. In closing his opinion, he further says, "that whatever interest Ford had, to the land, passed from him by the attachment, condemnation, and sale; and, of course, when his representatives filed the present bill, they had not the redeeming power vested in them."

And now, lastly, may not the same thing be said of the equity of redemption, in this case, even if it should be thought I am incorrect as to the general question, which I think I have sustained, that an equity of redemption of lands, where the mortgagor is in possession, before foreclosure, may be affected by a *fieri facias* on a judgment obtained by a creditor.

The judgment, in the present case, was a magistrate's judgment, and the *fieri facias* issued thereon under the Act of Congress of 1812, § 15. [2 Stat. at Large, 755.] That section is in these words: "That upon a *fieri facias* issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such *fieri facias*, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant." The words of the attachment law are, "the lands, tenements, goods, chattels and credits" — so that upon a comparison of these two laws, the terms are almost identical; if any difference, the words of the Act of Congress are more comprehensive. I should really think that after the numerous judicial decisions, both in the State Court and United States Court, in giving the proper construction to those terms, and so extending them as to include an equity of redemption in lands, expressly, there could be no need for me to say another word. It is true, the Act of Congress, so far as it directed the execution to be issued out of the office of the clerk of the county of Washington, has been repealed, but I think the justice of the peace who is now authorized to issue instead of the clerk, is authorized to issue the same kind of execution, and with the same comprehensive effect as to the subjects.

In 8 East, 485, the judge, in delivering the opinion of the court, says: "But the inconvenience in the case put," (in case an equity of redemption could not be sold under a *fieri facias*,) "does not extend beyond the necessity which such a step would occasion of resorting to a different remedy, to be applied in another court, by a bill to be filed by a judgment creditor, in such other court, for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common-law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor." 3 Atk. 200, 739.

So in 4 Johns. Ch. Rep. 692, Chancellor Kent says, "It may be laid down as a rule of equity, that an execution creditor at law has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate, and the

party, so redeeming, will be entitled, in either case, to a preference according to his legal priority."

I am, therefore, brought to this conclusion: That the complainant, Van Ness, by the judgment, *feri facias*, and sale, and purchase under it, of the equity of redemption of Shields, of the unexpired part of the term, became the legal assignee thereof, and of all the equitable interests of Shields, as incident to and connected with, his leasehold interest in the land; and that he is entitled to his decree accordingly.

I do not think the defendant, Hyatt, can reasonably object to want of notice. I think he had all the notice Van Ness was bound to give.

CRANCH, C. J. It has been before observed, that "in no case had the courts of Maryland, before the 27th of February, 1801, ever decided that an equity of redemption could be seized and sold under a *feri facias*."

But, it has been suggested, that the course of legal decisions in Maryland will show that their courts have, in effect, held that such an interest was subject to a *feri facias*; and the cases cited for that purpose, are those of *Campbell v. Morris*, decided in the General Court of Maryland, and in the Court of Appeals in Maryland in 1797, and in the Supreme Court of the United States in 1815; *Purl v. Duwall*, in the County Court of Prince George's county, in Maryland, in 1820; and *Ford v. Philpot*, in the Court of Appeal of Maryland in 1821.

The case of *Campbell v. Morris*, is reported in 3 Har. & McHenry, 557, as it appeared in the General Court, and in the Court of Appeals. The General Court, which, at that time, was supposed to be at least fully equal to the Court of Appeals in legal learning and talent, was clearly and decidedly of opinion that an equitable interest could not be attached; and the Court of Appeals, although they reversed the judgment of the General Court, who quashed the returns of the writs of attachment, gave no reasons for the reversal; but from the argument of Mr. Shaaff, who was counsel of Mr. Campbell, the attaching creditor, and the letter from Judge Rumsey, the chief judge of the Court of Appeals, to Mr. Morris's counsel, (see 9 Cranch, 476,) it appears that the judges (excepting the chief judge himself,) thought the covenant for quiet enjoyment was a lease for years to the mortgagors, and gave them a legal estate which was attachable; and they gave no opinion upon the question whether an equity of redemption was liable to attachment.

The authority of that case, therefore, is decidedly against the principle for which it was cited.

In the case of *Pratt et al. v. Law & Campbell*, 9 Cr. 496,

where the same question was raised upon the same attachment, the Supreme Court say: "Much ability has been exhibited in argument on the question whether an equitable interest, in lands and tenements, be the subject of attachment under the laws of Maryland. But we are of opinion that we are not now at liberty to enter into the consideration of that question. The decision of the Court of Appeals is final and conclusive on this point. The question was finally brought before them; and although it had not fixed the law, would have fixed the fate of these lands beyond reversal. Some doubt is entertained by one member of the court, whether the laws of Maryland go further than to authorize the condemnation of this interest to satisfy the judgment, so as to leave the plaintiff still under the necessity of applying to an equitable tribunal to effect a sale.

"But the majority are of opinion, that the attachment act, in making the interest tangible, makes it subject to the ordinary process of the law courts; and that, in vesting in the courts in which the condemnation takes place, the power to issue execution as in cases of other judgments, it has left with those courts so to fashion its process as to meet the exigency of each case. In this case the very special nature of the execution shows that it has been fashioned with great care and learning. We therefore hold the sale under this execution to be valid."

Here it is evident that the doctrine of the liability of an equity of redemption to condemnation under attachment in Maryland, receives no additional sanction from the Supreme Court of the United States, who expressly disclaim the consideration of that question, considering it as settled, in regard to that case, by the Court of Appeals of Maryland.

But if the case of *Campbell v. Morris* could be considered as having settled the law of Maryland upon that question, (which I think it could not,) yet that was a case of attachment and condemnation; not a simple case of *feri facias* under an ordinary judgment.

The process of attachment was given for the purpose of enabling a creditor to get at property which he could not affect by the ordinary process of law, and it creates a lien from the time of service of it. It authorizes a condemnation of the property attached, and a *feri facias* of the property condemned. The Act of 1795, c. 56, authorizes an attachment of the lands, tenements, goods, chattels, and credits, of the debtor. The common writ of *feri facias* commands the sheriff to make the money of the goods and chattels of the debtor; and until the statute of 5 Geo. 2, c. 7, in the year 1732, lands in Maryland were never sold under a *feri facias*. Previous to that statute, lands could only be extended by *elegit*, as

they are now in Virginia. See Kilty's Notes on that statute, p. 249. The statute 5 Geo. 2, c. 7, § 4, provides "that houses, lands, negroes, and other hereditaments and real estates in the plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling, or disposing of, any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands; and in like manner as personal estates, in any of the said plantations respectively, are seized, extended, sold or disposed of, for the satisfaction of debts."

"Soon after this statute became known in the province, (says Mr. Kilty,) "the practice began of selling lands under writs of *fiery facias*, and the remedy by *elegit* ceased to be used." The writ of *fiery facias* was, therefore, in Maryland, extended to houses, lands, negroes, and other hereditaments and real estates; but there is no evidence that any other than legal estates could be seized and sold under a *fiery facias*, or that the common law of England, upon that subject, which had prevailed in Maryland before that statute, was thereby altered in that respect. The thing itself was to be sold, not a chose in action, nor an equitable conditional right to claim the thing. Under the attachment law, a chose in action might be attached, condemned, and perhaps sold, under a special *fiery facias* founded on the condemnation; but an equity of redemption is not provided for under that law; and if it were, it does not follow that it, any more than any other chose in action, could be sold under a *fiery facias*, without a previous attachment and condemnation."

If, therefore, we were to admit that the court in the case of *Campbell v. Morris*, decided that an equity of redemption was liable to attachment, it does not follow that it can be sold under a *fiery facias* without attachment. But I do not by any means admit that case to be an authority for that point; because, as before observed, Mr. Campbell's counsel, Mr. Shaaff, contended that the covenant, on the part of Mr. Law, contained in the mortgage, that Morris, Nicholson, and Greenleaf, should remain in possession until default made in the condition, gave Morris and Nicholson a legal estate for years which could be condemned and sold; and the chief judge of the Court of Appeals states, ex-

pressly, that the judgment of the General Court was reversed on that ground, and that the court gave no opinion upon the question whether an equitable interest was liable to attachment; so that the opinion of the General Court, which was full and decided upon that point, stands unreversed.

The next case cited to prove that the course of legal decisions in Maryland will show that their courts have, in effect, held that such an interest was subject to a *fieri facias*, is *Purl v. Duvall*, in Prince George's County Court, reported in 5 Har. & Johns. 69-74, and decided in 1820, nineteen years since this district was separated from Maryland, and upon a transaction which originated long after that separation.

The case appears to be this: Purl had contracted to purchase of Magruder one hundred acres of land, being part of a tract called "Magruder's Plains enlarged," and was probably put in possession without any legal title. The purchase-money not having been paid according to agreement, Magruder brought a suit at law against Purl, and at September term, 1806, obtained a judgment for seven hundred and twenty dollars, upon which, after two *ca. sa's* entered, "not called, by consent," and the payment of three hundred and forty dollars, a *fieri facias* was issued on the 7th of December, 1807, which was returned in April, 1808, "made to the amount of two hundred and fourteen dollars and seventy-two cents laid, as per schedule; for residue, not sold for want of buyers." Notley Maddox was then the sheriff. The schedule contained part of a tract or parcel of land called "Magruder's Plains," containing eighty-one acres. Nothing further was done until the 4th of June, 1810, when Magruder, having been, perhaps, advised that a mere equitable title could not be seized and sold under an ordinary writ of *fieri facias*, conveyed the legal title in fee to Purl, and thereupon on the 17th of September, in the same year, 1810, took out a *venditioni exponas*, commanding the sheriff to expose to sale the eighty-one acres of "Magruder's Plains," upon which he had levied the *fieri facias* in 1808. This *venditioni exponas* was directed to Notley Maddox, late sheriff, &c., (one Darnal having, in the mean time, been elected sheriff of the county,) and at April term, 1811, was returned "not sold for want of buyers." On the 23d of June, 1812, another writ of *venditioni exponas* was issued returnable to September term, 1812, and directed "to the sheriff of the said county." This writ was returned "made," by Darnal, the then sheriff, who sold the land to Duvall. Purl, thereupon, brought his action of ejectment, and at the trial the defendant relied upon his title thus obtained by the sheriff's sale after the legal title had been thus conveyed to Purl by Magruder. Whereupon Purl prayed the court to direct the jury that the evi-

dence so offered by the defendant was not sufficient to sustain the issue on his part; and that the title by him set up under the judgment and the proceedings under the same, the sale by the sheriff, and the deed executed by him to said defendant, is not a good and valid title in law. Which opinion the court refused to give, and directed the jury that the plaintiff, on the facts stated, if found to be true by the jury, was not entitled to recover. Purl appealed to the Court of Appeals.

Mr. Stephen, the counsel of the appellee, said:

“There are two questions in this case,

“1. Whether an equitable interest in land taken in execution under a *fiery facias*, can be sold under a *venditioni exponas*, the legal title having been acquired in the mean time.”

“2. Whether, if the land was levied upon and advertised as ‘Magruder’s Plains,’ and sold and conveyed as ‘Magruder’s Plains enlarged,’ the defendant in the judgment and execution can avail himself of this objection in an action of ejectment?”

Mr. Justice Dorsey, in delivering the opinion of the Court of Appeals, (after observing that the following points were made, namely:

1. That the return of the *fiery facias* was too uncertain as to the description of the land.

2. That the plaintiff’s lessor, at the time the *fiery facias* was laid, had only an equitable interest in the land.

3. That Darnal had no power to sell the property which had been levied upon by his predecessor, Maddox,) said: “The court do not deem it necessary to give any opinion on the first and second points, because they are of opinion that Darnal had no authority to execute the writ of *venditioni exponas*.”

At the time of levying the *fiery facias*, Purl had only a bare equitable claim to the land, upon paying the purchase-money. The argument, drawn from the nature of a mortgagor’s interest, does not apply to this case. Such a naked equity had never been adjudged, in Maryland, to be liable to be seized and sold under an ordinary writ of *fiery facias*. The counsel of Magruder seems to have been aware of this, for he did not venture upon a sale under the *fiery facias* until Magruder had conveyed the legal estate to Purl, by the deed of the 4th of June, 1810, more than two years after the execution was levied.

That the conveyance of the legal estate to Purl, before the sale, was deemed a very important fact in the cause, appears by Mr. Stephen’s statement of the questions which would arise in the argument; and there can be little doubt that it was the fact which mainly induced the County Court to refuse the instruction to the jury, prayed by the plaintiff’s counsel.

This case, therefore, does not seem to me to afford any evidence that the course of legal decisions, in Maryland, will show that their courts have, in effect, held that such an interest, that is, an equitable interest, was subject to an ordinary *feri facias*, even as late as 1808, much less before 1801.

The next and last case, cited for that purpose, is that of *Ford v. Philpot*, reported in 5 Har. & Johns. 315, and decided by the Court of Appeals in Maryland, in 1821.

The case appears to be as follows:

In 1754 certain lands were mortgaged by Ford to Larsh, or to some person under whom he claimed. Ford, the mortgagor, and those claiming under him, remained in possession until 1789, when Larsh obtained a judgment against him on his bond given for the money due on the mortgage, and after two *non ests*, took out an attachment under the Act of 1715, c. 40, and attached the mortgaged lands then in possession of the mortgagor, which were condemned and sold under the *feri facias* issued upon the judgment of condemnation, and bought by one Hughes, who purchased of Larsh all his right as mortgagee, and then sold the property to Philpot, the defendant. Ford, or those claiming in his right, brought his bill in the Court of Chancery in Maryland, where the chancellor decreed that he should be permitted to redeem by a certain day, upon paying up the mortgage money, and for certain improvements which had been put upon the land by Hughes or Philpot; and that if he did not so redeem, by the day, the bill should be dismissed. He refused to redeem on those terms; the bill was dismissed, and he appealed.

This case, therefore, was upon an attachment and condemnation, in 1789. The plaintiff, Larsh, who obtained the original judgment against Ford, might have issued a *feri facias* directly upon that judgment; and if an equity of redemption was, by law, liable to be seized and sold under an ordinary *feri facias*, his remedy would have been as complete as if the right had been attached and condemned. But it seems his counsel did not think proper to risk it upon an ordinary *feri facias*, and proceeded by way of attachment and condemnation; so that the case affords a strong presumption that the lawyers of that day were of opinion that an equity of redemption, even where the mortgagor remained in possession, was not liable to seizure and sale under an ordinary *feri facias*; and Judge Johnson, of Maryland, who delivered the opinion of the Court of Appeals, after stating that the mortgagor is now considered as the owner of the property, against all the world, except the mortgagee, and liable to all the incidents of a legal estate, except dower, says:

“The property mortgaged is substantially his, liable to the

incumbrance of the debt. Subject to that responsibility, he can sell it, to meet any other claims or demands, to whom he pleases; and without his permission, and against his will, it may be withdrawn from him, in discharge of his debts, by a decree and sale under the authority of a court of equity; and since the year 1810, it is expressly made responsible, at law, for his debts, as well as any other equitable interest a debtor may be entitled to. But was it susceptible of being taken under the attachment in the year 1789, and could it be disposed of under the *feri facias*?

"If it be conceded, that, in England, the right of redemption cannot be taken in execution and sold by a *feri facias*, that is, the equity of redemption in chattels real; and that, before the year 1810, in this State, a *feri facias*, on mere common-law judgments, would not reach such property; yet it will not follow that it may not be approached, or made liable by attachment. There are no words or expressions in the attachment law of 1715, c. 40, confining its operation to such property as could be affected by *feri facias* on ordinary, or common-law judgments. Its language is, 'to award an attachment against the goods, chattels, and credits.' By what process of law could the credits of a judgment debtor be affected? The writ of *feri facias* could not meet them; and if they could be made responsible, the aid of a court of equity must be solicited; and when the act caused one interest to be affected at law, it is not presumed that any reason exists for excluding any other property, belonging to the debtor, from the same liability."

Again, he says: "It appears, in itself, but just, that the interest which a mortgagor has in property mortgaged by him, should be liable, at law, as well as in equity, for his debts; and there appears no force in the observation, that it is not, at law, subject to a *feri facias*, because it is not tangible; for the right itself, whether legal or equitable, is not tangible; but the land is; and, by the sale, the interest of the party, whether legal or equitable, may well pass; if a legal interest, and the party in possession will not give it up, the purchaser is driven to his ejection; and if only equitable, to get possession, he must resort to a court of equity, when, if the sale, under the *feri facias*, passed the right, he would not only obtain the possession, but the legal estate also. And as it appears by the judgment of the Court of Appeals, in the case of *Campbell v. Morris*, 3 Har. & McHenry, 355, that the equity of redemption may be sold under an attachment issued in virtue of the supplementary act; and as the original and the supplement are the same, as to the property to be affected, and as the court are not, in the slightest degree, disposed to question the propriety of the decision made in the case mentioned, they are

drawn to the conclusion that whatever interest Ford had, to the land, passed from him by the attachment, condemnation, and sale, and, of course, when his representatives filed the present bill, they had not the redeeming power vested in them."

This case of *Ford v. Philpot* seems to have been decided upon the authority of *Campbell v. Morris*, in which case it is certain that the Court of Appeals did not decide the question whether an equity of redemption would pass by the attachment, condemnation, and sale; and it is equally certain that the General Court of Maryland, at that time an abler court than the Court of Appeals, decided clearly that it would not. The Court of Appeals only decided that Morris had a legal estate which might be attached, condemned, and sold.

But giving the utmost force and extent to the cases of *Campbell v. Morris*, *Pratt v. Campbell*, and *Ford v. Philpot*, which have been claimed for them, and they do not affect the question whether an equity of redemption can be seized and sold under an ordinary *feri facias* upon a common-law judgment. Neither before nor since the 27th of February, 1801, has that question been decided by the Maryland courts, in the affirmative, so far as my information extends; while all the cases which I have seen, bearing, in any degree, upon it, look quite the other way.

Thus in the case of *Purl v. Duvall*, (5 Har. & Johns. 69,) although the plaintiff caused his *feri facias*, in December, 1807, to be levied upon the land in which his debtor had only an equitable interest, he would not risk a sale until the summer of 1812, when the debtor had acquired the legal estate. I have never heard any one contend that such a bare equity as Purl had at the time of the levying of that *feri facias*, was liable to seizure and sale under a common execution upon a common-law judgment.

The only use of subjecting an equitable interest to execution at law is to give the plaintiff a lien prior to other creditors and to enable him to appropriate to himself those equitable assets which a court of equity would decree to be divided *pari passu* among all the creditors. To affect equitable rights, a creditor ought to be obliged to come into a court of equity which will compel him to do equity while asking it for himself.

Upon the whole, with all the light thrown upon this question by the cases of *Campbell v. Morris*, *Pratt v. Campbell*, *Purl v. Duvall*, and *Ford Philpot*, I am confirmed in the opinion, that by the *feri facias* and sale under the judgment in the case of *Van Ness v. Shields*, Mr. Van Ness did not acquire the right of redemption of the mortgaged property in the bill mentioned, and that the bill ought to be dismissed with costs.

THRUSTON, J., concurred. MORSELL, J. dissented.

Pote v. Philips.

Bill dismissed with costs.

Decree affirmed by the Supreme Court, 2d March, 1839. 13 Peters, 294.

WILLIAM POTE, for the Use of W. L. Brent, v. WILLIAM PHILIPS.

If there has been no settlement of the partnership accounts, one partner cannot maintain an action at law against the other, for any matter relating to their partnership affairs.

Although the partnership accounts may have been settled, and a balance acknowledged to be due by one partner to the other; yet the creditor partner cannot maintain an action at law for that balance without proving an express promise, by the debtor partner, to pay it.

ASSUMPSIT, upon the common money counts.

The plaintiff and defendant had been partners in merchandise, and on the trial at March term, 1836, in order to prove a settlement of the partnership concerns, and an acknowledgment of a balance due by the defendant to the plaintiff, he offered the testimony of — Wilson, who testified, that on some day, the particular time or year, he could not recollect, the plaintiff and defendant met at the plaintiff's shop on Twelfth Street West, and Pennsylvania Avenue, and the account books of the plaintiff and defendant were produced. The plaintiff told the defendant that he, the defendant, owed him about \$1,200. The defendant said he did not owe him so much. The plaintiff then asked him how much he owed him; and the defendant said he owed him about \$1,000, but he would never settle or pay a cent until the plaintiff produced an account which he had rendered to the defendant, and which the defendant falsely said that the witness had stolen from him. The plaintiff and defendant had been in partnership under the firm of William Philips & Co. in a business of buying wood and other things in a shop and on a wharf near the Washington Bridge, the capital of which concern was furnished principally by the plaintiff. That the book produced by the defendant was a partnership book kept by the defendant at the shop and wharf. That the plaintiff's book was his individual book, kept by him in a different shop in which he carried on a sole business, in a different part of the city, and in which he had charged William Philips & Co. with articles of merchandise and cash. That the object of the meeting on the part of the plaintiff, was a settlement of the partnership account, and of his account against the defendant individually.

Also the testimony of Richard Wright, who testified that there had been an attempt to arbitrate the accounts; and that he had been requested by the plaintiff to act as his agent in stating and

settling the accounts. That there had been several meetings between the plaintiff and defendant, at one of which the books of both parties were produced, and this witness extracted from both, the items admitted by the parties, which were added up on both sides; and the balance in favor of the plaintiff was about \$1,150. That in this account, thus stated, he charged the defendant with all the items charged by the plaintiff, as well against the defendant personally, as against the firm of William Philips & Co.

THE COURT, at the prayer of the defendant's counsel, instructed the jury that if they should be satisfied, by the evidence, that there had been no settlement of the partnership accounts, and that the plaintiff's claim is upon matters relating to their partnership affairs, the plaintiff cannot recover in this action at law. Whereupon, *Mr. Brent*, for the plaintiff, prayed the Court to instruct the jury that if the defendant acknowledged that he was indebted to the plaintiff, upon settlement, in the sum of \$1,000, the plaintiff could recover, notwithstanding the claim arose upon their partnership concerns. And he cited *Fromont v. Coupland*, 2 Bing. 170; *Robson v. Curtiss*, 1 Starkie, 78; 2 Serg. & L. 304, S. C., *Clark v. Glennie*, 3 Starkie, 10; *Rackstraw v. Imber*, 1 Holt, 368; *Musier v. Trumpbour*, 5 Wend. 275; Collyer on Part. 153; *Lamalere v. Caze*, 1 Wash. C. C. R. 435.

Mr. Z. C. Lee and *Mr. Hellen*, for the defendant, *contra*, contended that there was no evidence of a settlement of the partnership accounts, and that if there were, a settlement alone, and a balance acknowledged, are not sufficient to support an action at law, without an express promise to pay. *Foster v. Allenson*, 2 T. R. 483; *Fromont v. Coupland*, 2 Bingh. 170; Gow on Part. 87.

THE COURT, being divided, (THRUSTON, J., not having heard the evidence, did not give any opinion,) did not give the instruction prayed by *Mr. Brent*.

MORSELL, J., because he thought there was no evidence tending to prove a settlement; and because a settlement and balance struck and acknowledged by the parties, will not support an action at law without an express promise to pay.

CRANCH, C. J., thought there was some evidence tending to prove a settlement, namely, his acknowledgment that he owed, or would owe the plaintiff \$1,000 upon the partnership concerns; the meeting being for a settlement, and having the whole accounts open before them, and the amount and balance being stated by the witness in the presence and hearing of the defendant, and not objected to; and that these circumstances should be left to the jury.

He was also of opinion, that if there was a settlement of the

whole partnership accounts, and a balance struck and admitted by the parties, an express promise to pay, is not necessary to support an action by the creditor partner.

He observed, that all the cases, in which it is said that an express promise is necessary, depend upon the case of *Foster v. Allenson*, 2 T. R. 483, in which the only question was, whether the plaintiff ought not to have brought his action of covenant upon the sealed articles of partnership, by which each partner bound himself to pay any balance which should appear against him upon the final settlement of the accounts, and not an action of *assumpsit*; because covenant is a higher action than *assumpsit*; and the rule of law is, that a man shall not maintain the inferior, when he has a right to a superior action. But the Court decided, that although the plaintiff might have had an action of covenant on the articles, yet, as the acknowledgment of the balance of the partnership accounts was a good consideration for a promise, and as, in that case, there was an express promise to pay, the action of *assumpsit* was maintainable.

Neither in that case, nor in the case referred to in the note to that case, is it decided that an express promise was necessary in any case where the plaintiff is not entitled to a higher action.

The reason why one partner cannot sue another at law is, that nothing is due from one to the other on account of the partnership transactions, until the final settlement of the partnership accounts which can be compelled only in chancery. But when the partnership is dissolved, and the accounts are finally settled, and the balance struck and admitted, the reason ceases, and the parties stand in the same relation to each other, as ordinary debtors and creditors; and there is as much reason why the law should imply an *assumpsit* upon the acknowledgment of the balance due, in one case, as in the other.

The jury found a verdict for the plaintiffs; and the Court granted a new trial, which came on at March term, 1837, when

Mr. Hellen, for the defendant, prayed the Court to instruct the jury, in effect, that there was no evidence of a final settlement of the partnership accounts, and that if there were, the defendant is not liable at law, unless upon his express promise to pay the balance.

The COURT (CRANCH, C. J., *contrà*,) stopped *Mr. Hellen*, who cited 9 Serg. & R. 241, and who was about to argue in support of his prayer; and requested to hear the other side.

Mr. Brent, for the plaintiff, cited *Clark v. Glennie*, 3 Starkie's Rep. 60; *Rackstraw v. Imber*, 1 Holt, 368; *Robertson v. Curtiss*, 1 Starkie's Rep. 63, 78; *Musier v. Trumbour*, 5 Wend. 275; *Davis v. Barney*, 2 Gill & Johns. 404; Starkie on Ev. part 4,

Corporation of Washington v. Barber.

p. 434; *Bank of the United States v. Smith*, 11 Wheat. 172; 4 Wheeler, Dig. 342.

The COURT (CRANCH, C. J., *contra*,) gave the instruction as prayed by Mr. Hellen.

Verdict for the plaintiff, \$950, with interest from 11th August, 1833.

CORPORATION OF WASHINGTON, Appellant, v. NICHOLAS BARBER, Appellee.

The Corporation of Washington has no right to require a keeper of a livery-stable to take, and pay for, a license to keep the same; but if it be taken, and paid for, and enjoyed, the money paid for it cannot be recovered back.

Semble, that money paid under ignorance of the law cannot be recovered back.

THIS was an appeal from the judgment of a justice of the peace, by which the appellee recovered of the corporation, \$40, which the appellee had paid for two years license to keep a livery-stable, issued in conformity with the provisions of the by-law of the 28th October, 1831.

Mr. Dandridge, for the appellee, cited *Moses v. McFerlan*, 2 Bur. 1005; *Bize v. Dickason*, 1 T. R. 285; *Smith v. Bromley*, Doug. 696, note; *Hunt v. Rousmanier*, 8 Wheat. 174, 211; *Morris v. Tarin*, 1 Dallas, 147, 148; *Lowry v. Bourdieu*, Doug. 471; *Farmer v. Arundel*, 2 W. Bl. 824, 825; *Bilbie v. Lumley*, 2 East, 469; *The Union Bank v. Bank of United States*, 3 Mass. 74; *Pearson v. Lord*, 6 Id. 81; *Hunt v. Rousmaniere*, 1 Peters, 15; *Garland v. Salem Bank*, 9 Mass. 408; *Browning v. Morris*, Cowp. 790; *Haven v. Foster*, 9 Pick. 112; *Lammott v. Bowley*, 6 Harris & Johns. 524.

Mr. Bradley, *contra*, cited *Bilbie v. Lumley*, 2 East, 469; *Nibbs v. Ball*, 1 Esp. Ca. 84; *Taylor v. Hare*, 1 New Rep. (4 B. & P.) 260; *Kinally v. Brown*, 1 Esp. Rep. 279; *Hampton v. Marriot*, 2 Id. 546; *Potter v. Bennis*, 1 Johns. 515; *Hall v. Shultz*, 4 Id. 240; *Lyon v. Richmond*, 2 Johns. Ch. Rep. 51, 60; *Shotwell v. Murray*, 1 Id. 512.

CRANCH, C. J., delivered the opinion of the Court.

This is an appeal from the judgment of a justice of the peace, upon a warrant to recover back \$40 paid by Barber to the Corporation of Washington, for license to keep a livery-stable for two years, at \$20 a year, under the by-law of the said corporation of the 28th October, 1831, upon the ground that the charter of the city did not authorize the corporation to require a license for keeping a livery-stable; and that the by-law was void, and the

money for the license wrongfully demanded and received by the corporation. The judgment of the justice was for the appellee.

It is now admitted that the by-law was void, the corporation having mistaken their powers in that respect; but it is contended that the appellee cannot recover back the money paid.

1. Because the appellee paid it under a mutual mistake of the law only, and not of any fact; and a mistake of the law is no ground of recovery.

2. Because the appellee had the benefit of the license for the two years, which, in his own judgment was worth the money, or he would not have paid it; and therefore he has no right, *ex æquo et bono*, to recover it back.

3. Because he paid it voluntarily when he had a good defence at law.

Being of opinion that the second ground of defence is conclusive against the appellee, I do not think it necessary to decide upon the first or third.

The case of *Taylor v. Hare*, (1 New. Rep. 260,) was very similar to the present. A patentee believing himself to be the inventor, had permitted the plaintiff to use the inventions, for several years, at £100 a year, which the plaintiff paid; but, discovering that the defendant was not the inventor, he refused to pay any longer, and brought his action to recover back the money he had paid.

Sir James Mansfield, C. J., said, "It is not pretended that any action, like the present, has ever been known. In this case, two persons, equally innocent, made a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing.

"Under these circumstances the latter agrees to pay the former for the use of the invention; and he has the use of it. *Non constat* what advantage he made of it; for any thing that appears he may have made considerable profit." "How then can we say that the plaintiff ought to recover back all that he has paid? I think there must be judgment for the defendant."

Heath, J. "There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land."

Roake, J. "I am of the same opinion."

Chambre, J. "The plaintiff has had the enjoyment of what he

stipulated for, and in this action the court ought not to interfere, unless there be something *ex æquo et bono* which shows that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money." "I am therefore of opinion that the judgment of nonsuit should be entered."

If it be said that in this case of *Taylor v. Hare*, the mistake was of the facts, and not of the law, it is so much the stronger; for then the plaintiff might have recovered, but for the enjoyment which he had of the thing. That enjoyment, then, is of itself a bar to the plaintiff's recovery.

So, in the present case, the appellee has had the benefit of his license for the two years, and, no doubt, made a profit equivalent to the money which he paid for it.

The license was granted and the money paid, under a mutual mistake of their legal rights, and I think the appellant may keep the money with a good conscience.

The question whether money paid under a mistake of the law only, but with a knowledge, or the means of knowledge of all the facts, can be recovered back, may not yet, perhaps, be fully settled; but the prevailing opinion, in the modern cases, seems to be against it.

Thus Chitty (on Bills, 236,) says, "it is now clearly established that even a mere promise to pay, made after notice of the *laches* of the holder, would be binding; though the party making it misapprehended the law."

In *Lowry v. Bourdieu*, Doug. 471, Buller, J., said, "There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, *ignorantia juris non excusat*."

In *Bilbie v. Lumbe*y, 2 East, 470, Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? (No answer being given, he continued.) "The case of *Chatfield v. Paxton* is the only one I ever heard of, where Lord Kenyon, at *nisi prius*, intimated something of that sort. But when it was, afterwards, brought before this court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful, at last, on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of igno-

rance might not be carried. It would be urged in almost every case."

In *Stephens v. Lynch*, 12 East, 38, the court considered the cases of *Chatfield v. Paxton* and *Bize v. Dickason*, as having proceeded on a mistake of the facts; "but here," says the court, "the defendant made the promise with the full knowledge of the circumstances, three months after the bill had been dishonored; and could not now defend himself upon the ground of his ignorance of the law when he made the promise."

In *Brisbane v. Davis*, 5 Taunt. 151, Gibbs, J., said, "We must take this payment to have been made under a demand of right; and I think that when a man demands money of another as a matter of right, and the other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money, he cannot recover back the sum he has so voluntarily paid." If we were to hold otherwise I think many inconveniences may arise. There are many doubtful questions of law. When they arise the defendant has an option either to litigate the question, or to submit to the demand and pay the money. I think that, by submitting to the demand, he that pays the money, gives it to the person to whom he pays it, and thus closes the transaction between them. He who receives it has a right to consider it his without dispute. He spends it, in confidence that it is his; and it would be most mischievous and unjust if he who has acquiesced in the right, by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money." "I am aware that cases were cited at the bar in which were *dicta* that sums paid under a mistake of the law, might be recovered back, though paid with the knowledge of the facts; but there are none of the cases which may not be supported on much sounder ground."

Mr. Justice Gibbs then reviews the cases of *Farmer v. Arundel*, 2 W. Bl. 825; *Lowry v. Bourdieu*, Doug. 471; *Bize v. Dickason*, 1 T. R. 285; *Chatfield v. Paxton*, B. R. Michaelmas 39, c. 3, mentioned in *Bilbie v. Lumbe*, 2 East, 471; *Bilbie v. Lumley*, 2 East, 469, and *Herbert v. Champion*, 1 Camp. 134; and says, in conclusion, "I think, on principle, that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back."

Heath, J., and Mansfield, C. J., concurred in opinion that the plaintiff could not recover. Chambre, J., dissented.

In *Haven v. Foster*, 9 Pick. 128, Morton, J., in delivering the opinion of the court, said, "In all civil and criminal proceedings, every man is presumed to know the law of the land; and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them."

In *Hunt v. Rousmaniere's Adm'rs.* 1 Peters, 15, Mr. Justice Washington, in delivering the opinion of the court, says, "The question then is, ought the court to grant the relief that is asked for, upon the ground of mistake arising from any ignorance of law."

"We hold the general rule to be, that a mistake of this character is not a ground of reforming a deed founded on such a mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters." Again, in p. 16, he says: "The cases in which the general rule has been adhered to, are, many of them, of a character which strongly tests the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee in a joint bond by two or more, agree with one of the obligors to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors. So, in the case of *Worral v. Jacob*, 3 Merivale, 271, where a person having a power of appointment and revocation, and, under a mistaken supposition that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revocation, the court refused to relieve against the mistake.

"The case of *Lord Irnham v. Child*, 1 Bro. C. C. 92, is a very strong one in support of the general rule, and closely resembles the present in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion that it would render the contract usurious.

The Court, notwithstanding the omission, manifestly proceeding upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause."

It is evident, that the court, in this case of *Hunt v. Rousmaniere*, was embarrassed by its opinion, given when the case was before them, in 1823, (8 Wheat. 174,) when C. J. Marshall, in delivering the opinion of the court, said, in p. 216: "We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief;" and therefore Mr. Justice

Washington was obliged to say: "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would be effected by the instrument which was finally agreed upon." "The agreement has been fully executed; and the only complaint is that the agreement itself was founded upon a misapprehension of the law; and the prayer is to be relieved from the consequence of such mistake."

The decree, dismissing the bill, was affirmed with costs.

In *Shotwell v. Murray*, 1 Johns. Ch. Rep. 516, Chancellor Kent says again: "Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle that is safe or practicable in the common intercourse of mankind."

If these cases do not establish the principle that a mistake of law cannot be rectified, either at law or in equity, they, at least, satisfy my mind upon the subject; and I must say, that, upon this ground, also, the appellee is not entitled to recover.

I am therefore of opinion that the judgment ought to be reversed with costs.

The other judges concurred.

Judgment reversed with costs.

FOREMAN V. HOLMEAD.

A deposition cannot, under the Act of Congress, be taken before a judge of the city court of the city of Lexington, in Kentucky.

MR. REDIN, for the plaintiff, offered to read a deposition taken before the judge of the City Court of the city of Lexington, in Kentucky.

MR. BRENT, for the defendant, objected that the judge was not such a judge or chief magistrate as is described in the 30th section of the Judiciary Act of 1789, [1 Stat. at Large, 73;] and

The COURT (MORSELL, J., absent,) refused to suffer it to be read.

SIMMS v. TEMPLEMAN, Garnishee of McCleary.

A new trial will not be granted because the jury, by mistake, took out with them the plaintiff's account, if it be withdrawn from them in a few minutes afterwards, by order of the Court.

THIS was an attachment under the Maryland Act of 1795, c. 56. The garnishee pleaded *nulla bona*, and *non assumpsit* by the defendant.

The plaintiff's account, for work and labor, was annexed, by a wafer, to the warrant of the justice of the peace to the clerk to issue the attachment; and upon the back of the warrant was written the plaintiff's short note of his cause of action, which stands in the place of a declaration, and upon which the issue was joined upon the plea of *non assumpsit*.

The jury took out with them the short note, to which were annexed the warrant and account, and an affidavit of the plaintiff, made in compliance with the Act of 1795, c. 56. The account had been proved by a witness, and the amount had been stated to the jury, and was also stated in the short note.

A few minutes after the jury had retired, *Mr. Marbury*, for the plaintiff, informed the Court that the account had been thus, by mistake, taken out by the jury, and requested the Court to send to the jury for the paper, which they did, and informed them that they had taken it by mistake; and it was thus withdrawn from them.

The verdict being for the plaintiff, *Mr. C. Cox*, for the defendant, moved for a new trial, because the account had been thus taken out by the jury.

But the COURT (MORSELL, J., absent,) refused.

UNITED STATES, at the relation of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore, v. AMOS KENDALL, Postmaster-General.

The Circuit Court of the District of Columbia has authority to issue a *mandamus* to an officer of the United States, commanding him to perform a ministerial duty required by an Act of Congress, in which the right of an individual is concerned, if that right is clear, and he has no other legal specific remedy.

The Court, upon a proper affidavit, will grant a rule to show cause why a *mandamus nisi* should not issue.

If a rule be laid upon a party to show cause why a *mandamus* should not issue, the Court cannot judicially take notice of a letter addressed by the party to one of the judges, stating reasons for declining to appear in Court to show cause, &c., and inclosing an opinion of the attorney-general that the Court has not jurisdiction to issue the writ.

United States v. Kendall.

The party to whom a *mandamus* is directed cannot be permitted to appear without returning the writ.

The cases of *McIntire v. Wood*, and *McClung v. Silliman*, considered.

The Circuit Court of the District of Columbia has jurisdiction in all cases arising under the Constitution and laws of the United States, and treaties made under their authority, if either of the parties shall be resident or found within the District.

It has all the federal jurisdiction of a Circuit Court of the United States, and all the jurisdiction of a State court.

The executive officers of the United States are personally liable, at law, for damages, in the ordinary forms of action for illegal, official, ministerial acts or omissions, to the injury of an individual.

It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined.

The Postmaster-General, in the discharge of those duties which are prescribed by law, is not lawfully subject to the control of the President.

The President's power of controlling an officer in the exercise of his official functions, is limited to those functions which are, by law, to be exercised according to the will of the President, and where the order of the President would be a justification in law.

A writ of *mandamus* is as much a means given to the executive to enable him to cause the laws to be faithfully executed, as a common *capias ad respondendum*, or a *feri facias*, or any other writ devised by the judicial power is, to enable him to discharge that duty.

ON the 26th of May, 1837, W. B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore filed their petition in the Circuit Court of the District of Columbia, praying the Court to issue a writ of *mandamus* to Amos Kendall, Postmaster-General of the United States, commanding him to credit the petitioners with the amount awarded to them by the Solicitor of the Treasury of the United States, under an Act of Congress passed for their relief on the 2d of July, 1836, and to pay the same to the petitioners, deducting only the amount which shall be justly chargeable against the same. The facts stated in the petition were verified by the affidavit of one of the petitioners.

Upon this petition, on the same day, the COURT passed the following order.

The United States on the relation of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore v. Amos Kendall, Postmaster-General of the United States.	}	Circuit Court of the District of Columbia for the County of Washington.
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The petition of the relators, and the affidavit of Lucius W. Stockton, one of them, having been presented to the Court, setting forth in substance, that the relators having sundry claims upon the post-office department of the United States under contracts made by them with the late Postmaster-General, William T. Barry, applied to the Congress of the United States for relief in the premises, who passed an act at the prayer of the said parties, which was approved on the 2d of July, 1836, in and by

which it was among other things provided, "that the Solicitor of the Treasury do examine into and adjust the said claims therein specified, and that the Postmaster General credit said contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, on account of such service or contract." That the said Solicitor of the Treasury did, in fact, make such decision and award, and did therein and thereby find due to said relators the sum of \$161,563.89 for principal and interest. That said Amos Kendall, although notified of the said awards and decisions did omit and neglect for a considerable period of time to carry the said award, and the said Act of Congress into execution, and did, some time after, partially execute the same by carrying to the credit of the said relators the sum of one hundred and twenty-two thousand one hundred and one dollars forty-six cents, (\$122,101.46) leaving of the said principal sum, so awarded, the sum of \$39,472.47 still due, which has not been credited or paid, although requested. That a correspondence took place between the relators or some of them, and the President of the United States, and a memorial was presented, on their behalf, to the Senate of the United States, who proceeding thereupon and upon the reports of the Committee of the Judiciary, passed a resolution that the Postmaster-General is fully warranted in paying, and ought to pay to William B. Stokes and others, respectively, the full amount of the award of the Solicitor of the Treasury. That said Postmaster-General, notwithstanding the premises and other facts detailed in said petition, still refuses, omits, and neglects to execute the said Act of Congress, and said awards, by carrying the said sum so withheld, to the credit of said petitioners; wherefore the said petitioners pray the said court to award the United States' writ of mandamus, to be directed to the said Amos Kendall, Postmaster-General of the United States, commanding him,

1. That he shall fully comply with, obey, and execute the aforesaid Act of Congress of July 2d, 1836, by crediting the petitioners with the full and entire sum so awarded as aforesaid, in conformity with the said award and decision; and

2. That he shall pay to the said petitioners the full amount so awarded with interest thereon, deducting only the amount which shall be justly charged or chargeable to the said memorialists against the same.

Whereupon, on motion of *Richard S. Coxe*, for the relators, and upon the reading of the said petition and accompanying documents, it is, this 26th day of May, 1837, ordered by the said Circuit Court, that the said Amos Kendall, Postmaster-General of the United States, show cause on Thursday, the first day of June next, if any he has, why the said writ of mandamus should not

issue as prayed by said memorialists; and that a copy of this order be served on the said Amos Kendall, Postmaster-General as aforesaid.

The rule was served on the Postmaster-General, on the day of its date.

On the 1st of June, no appearance was entered for him to show cause; but the following letter was addressed by him to the chief judge, which the Court decided it could not judicially notice, as he did not appear in court to show cause either personally or by counsel.

“Post-office Department, June 1st, 1837.

“Hon. William Cranch, Chief Justice, &c.

“Sir, In declining to appear before the Circuit Court of the District of Columbia, for the county of Washington, in obedience to their order of the 26th ult. for the purpose of showing cause why a mandamus should not issue, commanding me, as Postmaster-General, to pay Messrs. Stockton and Stokes and others, a sum of money claimed by them to be due from the Post-office Department, I beg you to be assured that I am not actuated by any want of respect for you and your associate judges, personally or officially, but altogether by high public considerations.

“Doubting whether any portion of the judiciary of the United States, and much more whether a court established in this district for purposes entirely local could constitutionally inquire into the official conduct of the President, or heads of Departments, who are responsible through the process of impeachment, with the view to control them in their ministerial functions, I deemed it my duty to ask the opinion and advice of the Attorney-General on the subject. A copy of his opinion I have the honor to inclose.

“As well for the reasons given by him, as from the conclusions of my own mind, I am constrained to the conclusion that your court possesses no legal or constitutional authority to require the attendance of the Postmaster-General in such a case, and that in countenancing the claim by an appearance before them, I should compromise my obligation to preserve, unimpaired, the rights of an independent department of the general government. Very respectfully, your obedient servant, Amos Kendall.”

The opinion of the Attorney-General, inclosed in Mr. Kendall's letter, is as follows :

“Attorney-General's Office, May 30th, 1837.

“Sir, It appears by your letter of the 29th instant, and the paper inclosed therein, that application has been made by William B. Stokes and others, to the Circuit Court of the District of Columbia, for the county of Washington, for a writ of mandamus to be directed to the Postmaster-General of the United States,

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directing him to execute a certain Act of Congress in the mode specified in such application; and that, in accordance therewith, the court has granted a rule upon the Postmaster-General to show cause why such writ should not issue. In answer to your call for my opinion and advice as to the jurisdiction of the court to entertain this procedure, and to issue the writ applied for, I have the honor to inform you, that I am clearly of opinion that no such jurisdiction is possessed by it.

In the case of *McIntyre v. Wood*, (7 Cranch's Reports, 504,) a similar question was brought up for decision in the Supreme Court of the United States, upon a division of opinion in the Circuit Court for the District of Ohio, upon a motion for a mandamus to the Register of the Land-Office at Marietta, commanding him to grant final certificates of purchase to the plaintiff for certain lands in that State. The Supreme Court decided that the Circuit Court had no power to issue such a writ; the judges being of opinion, that the power conferred by the Judiciary Act of 1789, [1 Stat. at Large, 73,] on the circuit courts to issue the writ of *mandamus*, is exclusively confined to those cases in which it may be necessary to the exercise of their jurisdiction. They considered the constitutional provisions concerning the judicial power of the United States, broad enough to authorize the delegation to the circuit court, of a power to issue writs of *mandamus*, in cases where some ministerial act is necessary to the completion of an individual right arising under laws of the United States; but as the acts of Congress delegated no such power, the conclusion was inevitable that it could not be exercised. The principle of this decision was recognized in the subsequent case of *McClung v. Silliman*, (6 Wheaton's Reports, 598,) and has never, to my knowledge, been called in question.

Unless, therefore, some power, in relation to the writ of *mandamus*, has been delegated to the Circuit Court for the county of Washington, beyond that possessed, in such cases, by the other circuit courts of the United States, the point must be regarded as settled by the highest judicial authority. I have carefully examined the acts of Congress organizing the court, and regulating its jurisdiction; but though it possesses some powers not delegated to the other circuit courts, I do not find that it has ever been authorized, in express terms, or by any general power, to issue a writ of *mandamus* to an executive officer of the United States. In this respect, I think its jurisdiction the same with that of the other courts; and consequently it cannot rightfully entertain the procedure referred to.

I am, Sir, very respectfully,
your obedient servant,
B. F. BUTLER."

"Hon. Amos Kendall, Postmaster-General of the United States.

"The rule to show cause is herewith returned."

The Postmaster-General not having appeared to show cause, *Mr. R. S. Coxe*, for the relators, in support of the rule, contended,

1. That the right of the relators was clear.
2. That the writ of *mandamus* is the proper remedy, and
3. That this Court has power and jurisdiction to issue the writ in the present case.

1. Upon the first point he cited the Act of the 2d of July, 1836, "for the relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," by which it is enacted, "That the Solicitor of the Treasury be, and he is hereby authorized and directed to settle and adjust the claims of William B. Stokes and Richard C. Stockton, of Maryland, and Lucius W. Stockton and Daniel Moore, of Pennsylvania, for extra services performed by them, as contractors for carrying the mail, under and by virtue of certain contracts therefor, by them alleged to have been made and entered into with them by William T. Barry, late Postmaster-General of the United States; and for this purpose to inquire into and determine the equity of the claims of them, or any of them, for or on account of any contract, or additional contract with the said Postmaster-General, on which their pay may have been suspended by the present Postmaster-General; and to make them such allowances therefor, as upon a full examination of all the evidence, may seem right according to the principles of equity; and that the Postmaster-General be, and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them for and on account of any such service or contract; and the solicitor is hereby authorized to take testimony, if he shall judge it to be necessary to do so; and that he report to Congress, at its next session, the law and the facts upon which his decision has been founded."

The act then provides, that the solicitor shall not be authorized to make allowances for certain claims particularly specified therein; but which do not affect the present case.

Mr. Coxe then produced the awards of the Solicitor of the Treasury, of the 12th and 23d of November, 1836, amounting to the sum of \$162,737.09, from which the solicitor afterwards made some deductions, leaving still \$161,563.89 due; of which the Postmaster-General, in obedience to the act, credited the contractors with the sum of \$122,101.46, retaining the residue, namely, \$39,472.47, which he refused to pay or credit.

Also a letter-from the Postmaster-General to President Jackson, dated December 27, 1836, as follows:—

“To the President of the United States. Sir: I have read the letter of Lucius W. Stockton, in behalf of himself and others, informing you of the award of the Solicitor of the Treasury in their favor, and making the following allegation and complaint, namely:

“‘The Postmaster-General, however, withholds from our credit and pay, a large part of this award, the non-payment of which is exceedingly oppressive to us, and we now conceive ourselves bound in duty to ourselves and our creditors to state the fact to the President, well knowing his determination to see, in all cases, that the laws are carried into effect.’

“The suspension made by me in the account of those gentlemen which produced their application to Congress for relief, amounted to the sum of \$122,101.46.

“The Solicitor of the Treasury has awarded them under the act for their relief, the sum of \$162,727.05.

“I have directed them to be paid, under that award, and in obedience to the law, the sum of \$122,101.46, being the entire amount suspended and referred to Congress. The remainder of the award, \$40,625.59, is made up of claims which may be divided into three classes, namely:

“1. An extension of certain allowances from the 1st of April to the 31st of December, 1835, for alleged extra services, \$26,862.00

“2. Interest, .6,894.93

“3. The amount of certain claims for extra services, most, if not all of which had been presented to my predecessor, and rejected by him, 6,868.66

“In all, the sum of \$40,625.59

“In my opinion the Act of July 2, 1836, authorized the Solicitor to examine and decide upon the claims which had been suspended by me, and no others. Such was my impression when the act passed, and such is believed to have been the intention of those who passed it.

“In obedience to the mandate of the law I have paid those gentlemen \$122,101.46, although I have yet to be convinced that they had the least claim in law or equity to one sixth part of that sum. When the law requires it of me, I shall, with equal promptitude, pay the remaining \$40,625.59, although satisfied that not one cent of it is justly due.

“I beg leave respectfully to suggest, that, inasmuch as Congress is now in session, the appropriate resort for the parties complaining is to that body for an explanatory act, which, if it confirm the

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opinion of the Solicitor, I shall implicitly obey. With the highest respect, your obedient servant,

AMOS KENDALL.

"P. S. Since the award was received, and in part executed, a letter has been received from the Solicitor reversing his decision on sundry items, amounting to \$1,163.16, and reducing the amount awarded by that sum. Mr. Stockton's letter is herewith returned."

This letter was transmitted by the President to Mr. L. W. Stockton, with the following indorsement :

"Washington City, December, 1836. Sir,—On the receipt of your letter of the 26th instant, I lost no time in referring it to the Postmaster-General for his report. Having received that report I hasten to forward it to you forthwith.

"It appearing that there is a difference of opinion between the Solicitor and the Postmaster-General upon the extent of the reference, under the law, to the Solicitor; the Postmaster-General having yielded to what he believes to be all that was submitted by the law to the Solicitor's decision, and paid the same. But Congress being now in session, and the best expounder of the intent and meaning of their own law, I think it right and proper, under existing circumstances, to refer it to that body for their decision. I deem this course proper, as the difference in opinion about the extent of the submission under the law arises between the head of the Post-Office Department, and the Solicitor of the Treasury; and as it appears that the Solicitor has reversed, in part, his decision and award. Yours respectfully,

ANDREW JACKSON.

"Mr. Lucius W. Stockton, acting for himself and others."

Also the memorial of these relators to Congress on the 3d of January, 1837, referred by the Senate to the Committee on the Judiciary, with the report of the Solicitor, made to Congress on the 26th of December, 1836.

Also the opinion of Mr. Butler, the Attorney-General, of the 31st of October, 1836, confirming that of the Solicitor of the Treasury as to the extent of the submission under the Act of July 2, 1836.

Also the report of the committee of the Senate made on the 20th of January, 1837, confirming the opinions of the Solicitor and the Attorney-General as to the extent of the submission, and concluding with the following resolution, which was unanimously adopted by the Senate.

"*Resolved*, That the Postmaster-General is fully warranted in paying, and ought to pay to William B. Stokes and others, respectively, the full amount of the award of the Solicitor of the Treasury."

Also a correspondence between the Postmaster-General and Mr. Grundy, the chairman of the committee of the Senate in rela-

tion to that report; the message of the President of the United States to the Senate of the 15th of February, 1837; and the further report of the same committee, made on the 17th of February, 1837, confirming their former report and the resolutions previously adopted.

From these documents, *Mr. Coxe* contended that the right of the relators was clear.

2. The second question is, Whether the writ of *mandamus* is the proper remedy.

Upon this question *Mr. Coxe* cited the case of *Marbury v. Madison*, 1 Cranch, 162-166; *Commonwealth v. Johnson*, 2 Binney, 275; The Post-Office Law of March 3, 1825, and that of July 2, 1836, § 22, and the previous acts respecting the Post-Office; 2 Davis's Abridgment, 435; *Osborn v. Bank of the United States*, 9 Wheat. 825; *Bank of the United States v. The Planters Bank*, 9 Wheat. 904; Story on the Constitution of the United States, 626, § 879; Rawle on the Constitution, 156; Burr's Trial, vol. i. p. 108.

3. The third question is, Whether this Court has the power and jurisdiction to issue the writ of *mandamus* in this case.

In considering this question *Mr. Coxe* referred to the cases of *McIntire v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 6 Wheat. 598; Story on the Constitution, 608, 609, 610, and *United States v. Arredondo*, 6 Peters, 709.

CRANCH, C. J., delivered the opinion of the Court upon the petition for a writ of *mandamus*.

The material facts stated in the affidavit upon which the rule was founded, are substantially as follows:

By the Act of Congress of the 2d of July, 1836, [6 Stat. at Large, 665,] "for the relief of William B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," the Solicitor of the Treasury was authorized and directed to settle and adjust their claims for extra services as contractors for carrying the mail under certain contracts made with them by Mr. Barry, the late Postmaster-General; and for that purpose to inquire into and determine the equity of their claims for and on account of any contract with the said Postmaster-General on which their pay had been suspended by the present Postmaster-General, and to make them such allowances therefor, as upon a full examination of all the evidence might seem right according to the principles of equity; "And that the Postmaster-General be and he is hereby directed to credit such mail contractors with whatever sum or sums of money, if any, the said Solicitor shall so decide to be due to them for or on account of any such service or contract."

The Solicitor decided the sum of \$161,563.89 to be due to them. The Postmaster-General has credited them with the sum

of \$122,101.46 only, and refuses to credit them with the residue of the sum so decided to be due to them, being \$39,492.47.

These facts, not being denied, must, for the present, be taken to be true; and the first question is, whether this Court, in such a case, has power and authority to issue a writ of *mandamus* commanding the Postmaster-General to credit the said mail contractors, Stockton, Stokes, and others, with the sum or sums of money decided by the Solicitor of the Treasury to be due to them for and on account of the services or contracts mentioned in the said Act of Congress of the 2d of July, 1836, [6 Stat. at Large, 665.]

The duty of the Postmaster-General under that act is clear and absolute, leaving him no discretion. It is a duty, in the execution of which the private rights of individuals are concerned; and the party against whom the right is claimed is resident within this district and county.

The right of the relators and the duty of the Postmaster-General appearing to be clear and absolute, the question arises, Do the laws afford a remedy?

If this had been a case against a State officer, arising upon a statute of a State in which the common law of England had been adopted, it would be a clear case for a *mandamus*, because the relators could not have any other specific remedy, nor any other remedy equivalent to a specific remedy, according to the forms of the common law.

But it is suggested that this Court has no power to issue a *mandamus* in such a case, because the other circuit courts of the United States have no such power; according to the decision of the Supreme Court of the United States in the cases of *McIntire v. Wood*, 7 Cranch, 504, and *McClung v. Silliman*, 6 Wheat. 598.

To understand the opinions of the Supreme Court, in those cases, it may be necessary to state the language of the eleventh and fourteenth sections of the Judiciary Act of 1789, [1 Stat. at Large 73,] to which Mr. Justice Johnson, who delivered those opinions, refers.

The words of the eleventh section, so far as they relate to this subject, are, "That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

The words of the fourteenth section are, "That all the before-mentioned courts shall have power to issue writs of *scire facias*,

habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The Constitution of the United States, (Art. 3, § 2,) provides, that "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors," &c.

The case of *McIntire v. Wood*, came up to the Supreme Court of the United States from the Circuit Court of Ohio, upon a certificate stating that the judges of that court were divided in opinion upon the question whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff for certain lands in that State.

Mr. Justice Johnson, in delivering the opinion of the Supreme Court of the United States, said,

"This Court is of opinion that the Circuit Court did not possess the power to issue the *mandamus* moved for.

"Independent of the particular objections which this case presents from its involving a question of freehold, we are of opinion that the power of the circuit courts to issue a writ of *mandamus*, is confined exclusively to cases in which it may be necessary for the exercise of their jurisdiction.

"Had the eleventh section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the fourteenth section of the same act would sanction the issuing of the writ for such a purpose; but although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases."

Here it is evident that the Supreme Court do not deny the power of the circuit courts to issue the writ of *mandamus* in some cases, but say that the power is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. If, then, a case should occur in which a writ of *mandamus* should be necessary to the exercise of the jurisdiction of a circuit court of the United States, it would seem that that court might issue it. And the Supreme Court says, further, that "had the eleventh section of the Judiciary Act covered the whole ground of the Constitution," that is to say, (as we understand the

opinion,) that if that section had given to the circuit courts cognizance of all cases in law and equity arising under the Constitution and laws of the United States, "there would have been much reason for exercising this power in many cases;" "and the fourteenth section," which gives them power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law, "would sanction the issuing of the writ for such a purpose."

But Congress, in giving jurisdiction to this court by the 5th section of the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] "concerning the District of Columbia," has covered the whole ground of the Constitution, and much more; with the exception of those cases only in which exclusive jurisdiction is given by the Constitution or Acts of Congress, to the Supreme Court of the United States, or to the District Courts of the United States. With that single exception, this Circuit Court of the District of Columbia has cognizance of all cases in law and equity, whether arising under the Constitution or laws of the United States, or under the adopted laws of Virginia and Maryland, with the only condition that one of the parties shall be resident, or found within the district.

The words of that section, (the fifth section of the Act of the 27th of February, 1801,) are,

"That the said court," (the Circuit Court of the District of Columbia,) "shall have cognizance of all crimes and offences committed within the said district, and of all cases in law and equity between parties, both or either of which shall be resident, or shall be found within the said district; and also of all actions or suits of a civil nature at common law or in equity in which the United States shall be plaintiffs or complainants; and of all seizures on land or water; and all penalties and forfeitures made, arising, or accruing under the laws of the United States."

This Court, therefore, is in that condition in which the Supreme Court, in the case of *McIntire v. Wood*, say, "there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right under the laws of the United States; and the fourteenth section of the Judiciary Act would sanction the issuing of the writ for that purpose."

Here is a case in which a ministerial act is necessary to the completion of an individual right under the laws of the United States.

The right of the relators, and the obligation of the Postmaster-General are clear and absolute. It is a case in law; and the only appropriate remedy is a writ of *mandamus*. This is the only judicial tribunal which can take original cognizance of the case and apply the proper remedy.

How, then, can this Court refuse it? To refuse it would be a denial of justice.

If it be a case for a writ of *mandamus*, the relators are as much entitled to it as any other person would be entitled to a writ of *habeas corpus* in a common action of *assumpsit* against an individual. If the law gives them a right, it gives them a remedy in some form. The only question, then, is, what is the proper form?

There are various writs to bring parties and their cases before the court. The selection of the writ depends upon the nature of the case. Neither an action upon the case, nor of *assumpsit*, (if it could be maintained,) nor an indictment, could give the relators a specific remedy.

Their right might, perhaps, be tried in some such form of action, but it would not give them a specific remedy, nor a remedy which would be certainly adequate to a specific remedy.

The proceeding by *mandamus* is a remedy given by that common law which was in force in Maryland and Virginia on the 27th of February, 1801, and continued in force in this district by the Act of Congress of that date, and which is still in force here. If a case is made out, in which, according to that law, the proceeding by *mandamus* is the proper remedy, this Court is bound to grant it.

The Supreme Court, in the case of *Marbury v. Madison*, (1 Cranch, 163,) say, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury."

"One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law; 'in all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.' And afterwards, in page 109 of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of common law, and herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right when withheld, must have a remedy, and every injury its proper redress.

"The government of the United States has been emphatically

termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested, legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. It behooves, then, to inquire whether there be, in its composition, any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress."

The Chief Justice then goes on to show that it was not a case of *damnum absque injuriâ*, and says, "Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed, by our Constitution, in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

"By the act concerning invalids, passed in June, 1794, (vol. iii. p. 112,) the Secretary at War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate?

"Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.

"After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, (vol. iii. p. 255,) says, 'But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.'

"By the act passed in 1796 authorizing the sale of the lands above the mouth of Kentucky River, (vol. iii. p. 299,) the purchaser, on paying his purchase-money, becomes completely enti-

bled to the property purchased; and on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition. It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice, or not, must always depend upon the nature of the act.

“If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

“By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

“In such cases, their acts are his acts; and, whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

“But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

“The conclusion from this reasoning, is, that, where the heads of departments are the political or confidential agents of the

executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

“If this be the rule, let us inquire how it applies to the case under the consideration of the court.

“The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

“The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

“So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it, must depend on the opinion entertained of his appointment.

“That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the President, the seal of the United States was affixed to the commission. It is, then, the opinion of the Court,

“1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and

that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

"2d. That, having his legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

"It remains to be inquired whether,

"3d. He is entitled to the remedy for which he applies.

"This depends on,

"1st. The nature of the writ applied for; and,

"2d. The power of this court.

"1st. The nature of the writ.

"Blackstone, in the third volume of his Commentaries, page 110, defines a *mandamus* to be 'a command issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice.'

"Lord Mansfield, in 3 Burrow, 1266, in the case of *The King v. Baker et al.*, states, with much precision and explicitness, the cases in which this writ may be used. 'Whenever,' says that very able judge, 'there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order, and good government.' In the same case he says, 'this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.'

"In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

"This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant,

in this case has a right to execute an office of public concern, and is kept out of possession of that right.

"These circumstances certainly concur in this case.

"Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

"1. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should, at first view, be considered by some as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

"But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress, and the general principles of law?

"If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the

legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process ?

“ It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. When the head of a department acts in a case, in which executive discretion is to be exercised ; in which he is the mere organ of executive will ; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

“ But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden ; as for example, to record a commission, or a patent for land, which has received all the legal solemnities ; or to give a copy of such record ; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

“ This opinion seems not now, for the first time, to be taken up in this country.

“ It must be well recollected that in 1792, an act passed, directing the Secretary at War to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional ; but some of the judges thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character.

“ This law being deemed unconstitutional at the circuits, was repealed, and a different system was established ; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list, was to be performed by the head of a department.

“ That this question might be properly settled, Congress passed an act in February, 1793, [1 Stat. at Large, 333,] making it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the United States, on the validity of any such rights, claimed under the act aforesaid.

"After the passage of this act, a *mandamus* was moved for, to be directed to the Secretary at War, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

"There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

"When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right.

"The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

"The doctrine, therefore, now advanced, is by no means a novel one. It is true that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute.

"It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the President for his use. The Act of Congress does not, indeed, order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

"It was, at first, doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a *mandamus* would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

"This, then, is a plain case for a *mandamus*."

From a consideration of the opinions of the Supreme Court in the cases of *Marbury v. Madison*, *McIntire v. Wood*, and *McClung v. Silliman*, we can have no hesitation in saying that the relators have made out a case, in which, according to the principles and usages of law, a writ of *mandamus* is the proper remedy, and that it is necessary to enable this Court to exercise its jurisdiction in that case.

But although we have shown, as we think, that, even under the opinion of the Supreme Court, in *McIntire v. Wood*, this Court has power to issue the writ of *mandamus*, in this case, yet it may possibly be objected that our argument is founded upon inferences drawn from the language of that opinion; which inferences Mr. Justice Johnson, in the case of *McClung v. Silliman* (6 Wheat. 598) repudiates.

The only point decided in that case was, that "a State court cannot issue a *mandamus* to an officer of the United States."

But Mr. Justice Johnson in delivering the opinion of the court, in that case, (in p. 599) said: "In the case of *McIntire v. Wood*, decided in this court in 1813, the *mandamus* contended for was intended to perfect the same claim, and in point of fact, the suit was between the same parties. The influence of that decision on these cases, is resisted on the ground that it did not appear in that case that the controversy was between parties, who, under the *description of person*, were entitled to maintain suits in the courts of the United States; whereas the averments, in the present cases, show that the parties litigant are citizens of different States, and therefore competent parties in the Circuit Court. But we think it perfectly clear, from an examination of the decision alluded to, that it was totally uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated is, whether the court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in the State?"

"Both the argument of counsel, and the opinion of the court, distinctly show that the power to issue the *mandamus*, in that case, was contended for as incident to the judicial powers of the United States. And the reply of the court is, that though, *argumenti gratiâ*, it be admitted that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature has only made a partial delegation of its judicial powers to the circuit courts; that if the inference be admitted, as far as the judicial power of the court actually extends, still cases arising under the laws of the United States, are

not *per se* among the cases comprised within the jurisdiction of the Circuit Court under the provisions of the 11th section of the Judiciary Act of 1789 [1 Stat. at Large, 73]; jurisdiction being in such cases reserved to the Supreme Court, under the 25th section, by way of appeal from the decisions of the State courts.

“There is, then, no just inference to be drawn from the decision in the case of *McIntire v. Wood*, in favor of a case in which the circuit courts of the United States are vested with jurisdiction under the 11th section. The idea is in opposition to the express words of the court, in response to the question stated, which are, ‘that the Circuit Court did not possess the power to issue the *mandamus* moved for.’

“It is now contended that as the parties to this controversy are competent to sue under the 11th section, being citizens of different States, this is a case within the provisions of the 14th section; and that the Circuit Court was vested with power to issue this writ under the description of ‘a writ not specially provided for by statute,’ but ‘necessary for the exercise of its jurisdiction.’ The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect.

“It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue.

“The 4th section of the act under consideration, could only have intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out. Such was the case brought up from Louisiana, in which the judge refused to proceed to judgment; by which act the plaintiff must have lost his remedy below, and this court have been deprived of its appellate control over the question of right.”

As far as we can understand this argument of Mr. Justice Johnson, which probably would have been more intelligible if the arguments of the counsel had been reported, he places the decision of the court, in the case of *McIntire v. Wood*, upon the ground that the controversy between the parties was a case arising under the laws of the United States, which would, *per se*, have been a good ground of jurisdiction in the circuit courts, if it had been given to those courts by the 11th section of the Judiciary Act of 1789; but as it was not so given, they had not

jurisdiction; and therefore they had not the power to issue the *mandamus* in that case. And from that decision, he says, as we understand him, it cannot be inferred that, if, in a like case, the controversy should be between citizens of different States, (which would be a case in which the Circuit Court would have jurisdiction under the 11th section of the Judiciary Act of 1789,) the court would have power to issue the writ of *mandamus*.

Whether we have, or have not, however, understood that opinion correctly, we do not deem of much importance in this case, because, as observed before, this Court has cognizance of all cases in law and equity, however arising, between parties, both or either of which are resident, or found within this district.

Our powers are given by the 3d and our jurisdiction by the 5th section of the Act of the 27th of February, 1801.

By the third section it is enacted, "That there shall be a court in the said district, which shall be called the Circuit Court of the District of Columbia; and the said court and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States."

The only circuit courts, and judges of the circuit courts of the United States, then existing, were those ordained and established by the Act of Congress of the 13th of February, 1801; [2 Stat. at Large, 89]; by the 10th section of which they were invested with all the powers theretofore granted by law to the circuit courts of the United States, unless where otherwise provided for by that act.

And by the 11th section it was enacted, among other things, that the said courts respectively should have cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, "and also all cases in law or equity arising under the Constitution and laws of the United States, and treaties made, or which may be made, under their authority." "And also of all actions or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof, where the matter in dispute shall amount to \$400, and where original jurisdiction is not given, by the Constitution of the United States, to the Supreme Court thereof, or exclusive jurisdiction, by law, to the district courts of the United States."

It is evident that this section "covered the whole ground of the Constitution;" so that, if it had been in force when the case of *McIntire v. Wood* arose, the decision in that case would probably have been different.

Although the Act of February 13, 1801, was repealed by the Act of 1802, yet the repeal did not in any manner affect the

powers or jurisdiction of this Court, given by the Act of February 27, 1801. [2 Stat. at Large, 103.]

But this Court has a jurisdiction still more extensive than that which was given by the Act of the 13th of February, 1801; and if the jurisdiction given by the 11th section of that act would have justified the court in issuing the *mandamus* under the 14th section of the Judiciary Act of 1789, *à fortiori* will the jurisdiction given to this Court, by the 5th section of the Act of the 27th of February, 1801, justify this Court in issuing it.

In the opinion of the Supreme Court, in *McClung v. Silliman*, Mr. Justice Johnson seems to have supposed that it was not sufficient that the writ of *mandamus* should be necessary for the exercise of its jurisdiction in the *mandamus* case itself; but that it must be necessary for the exercise of its jurisdiction in some ulterior suit. He says, (p. 601,) "It cannot be denied that the exercise of this power" (meaning the writ of *mandamus*,) "is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction; but because it does not possess it. It must exercise this power," (that is, issue the writ,) "and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue."

Although in the case of *McClung v. Silliman*, the *mandamus* might have been asked, for the purpose of obtaining a document necessary to the prosecution of another suit, yet it cannot be necessary, in all cases, that the *mandamus* should be merely an ancillary proceeding, with a view to an ulterior action. In the greater number of cases, the remedy by *mandamus* is final; and the Court must have jurisdiction of the case stated as the cause for issuing the writ, before it can be lawfully issued. The Court must possess the jurisdiction before they can exercise it. The Court exercises its jurisdiction when it calls the parties before it. If B., a resident of this district, is indebted to A., upon a promissory note, this Court has jurisdiction of the case. To enable the Court to exercise its jurisdiction in the case, some kind of writ is necessary. A *capias* is the usual writ. But it is only because it is a "writ necessary for the exercise of its jurisdiction" in that case, that the Court is authorized to issue it; for it is not specially given by the 14th section of the Judiciary Act, which is the only authority for issuing it. But it is one of the writs not specially provided for by statute; and it is a writ agreeable to the principles and usages of law, and necessary for the exercise of the jurisdiction of the Court in the given case, and therefore the Court may issue it.

Cases of *mandamus* stand exactly on the same footing. The

Court has no more authority for issuing a *capias*, than for issuing a *mandamus*.

It surely cannot be that a court can only issue a writ of *mandamus* because it has not jurisdiction, or for the purpose of creating a jurisdiction which did not exist before. It must be that we have misunderstood the language of the opinion; and we are the more inclined to think so, because, in the next sentence, the Judge says: "The 14th section of the act under consideration could only be intended to vest the power, now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." And again, in p. 604, he says: "But when in the cases of *Marbury v. Madison* and *McIntire v. Wood*, this court decided against the exercise of that power, the idea never presented itself to any one that it was not within the scope of the judicial powers of the United States, although not vested, by law, in the courts of the general government."

By which we suppose we are to understand that, when, in the case of *Marbury v. Madison*, the Supreme Court refused to issue the writ of *mandamus* because it would have been an exercise of original jurisdiction not warranted by the Constitution; and when in the case of *McIntire v. Wood*, the court decided against the exercise of the power, by the Circuit Court, to issue the writ, because Congress had not conferred upon the Circuit Court all the jurisdiction which it was authorized by the Constitution to confer, no one supposed that the power was not within the scope of the judicial powers granted to the general government; and we are still left to infer, that if Congress had conferred on the circuit courts all the jurisdiction which they might constitutionally have conferred, there could be no doubt of the power of the Circuit Court to issue the writ, under the power given in the 14th section of the Judiciary Act of 1789.

As the Postmaster-General has not thought proper to appear to show cause why the writ of *mandamus* should not issue, the Court will consider such objections as occur to them as being possible to be suggested.

If it should be said that if every neglect of duty by a public officer, by which an individual suffers an injury, is to be the subject of a *mandamus*, it will become the common mode of redress in such cases, and the officers of government may be harassed; we answer that every public officer who neglects or refuses to perform a mere ministerial duty, whereby an individual is injured, is legally responsible to that individual in some form or other; and a *mandamus* is one of the mildest forms of action which can be used; as it supposes that the duty may still be performed; and

as it does not subject the officer to pecuniary damages, and is one of the best forms in which the right of the supposed injured party may be tried.

As it can be used only in cases where a duty is to be performed, and where it is still in the power of the officer to perform it, the cases cannot be very numerous, and the officers will be less harassed by this form of action than by the other usual forms of action which are generally commenced by the severe process of personal arrest.

If it be said that a *mandamus*, commanding the Postmaster-General to pay, as well as to credit, the sum awarded by the Solicitor of the Treasury, would be the means of compelling the United States to pay money by legal process, without previous appropriation by law, the Court will take further time to consider, as we have doubts whether the *mandamus* should now go to that extent.

A doubt has been suggested "whether any portion of the judiciary of the United States, and much more, whether a court established in this district, for purposes entirely local, could constitutionally inquire into the official conduct of the President or heads of departments, who are responsible through the process of impeachment, with the view to control them in their ministerial functions."

In answer to so much of this objection as regards the other portions of the judiciary of the United States, we refer to the decision of the Supreme Court in the case of *Marbury v. Madison*, as delivered by the late Chief Justice Marshall, and which has been before cited.

With regard to the suggestion that the Circuit Court, established in this district, is for purposes entirely local, the fact is not so. This Court has all the jurisdiction which any other circuit court of the United States can have in its circuit, and much more. It is the court which the legislature of the United States has thought proper to ordain and establish as one of the courts inferior only to the Supreme Court of the United States, and to which it has confided the administration of those laws on which depends the protection of the lives, the personal liberty, and the property of the President, Vice-President, heads of departments, and other officers of the government, foreign ministers and strangers visiting the seat of government, as well as of the citizens and inhabitants of the district. This Court has power to call before it every person found in the district, from the highest to the lowest; and it is upon this power that they all depend for that protection which the law extends over them. If there is any officer of government in the district too high to be reached by the process of this Court, then

there is no legal security here for our lives, our liberty, or our property. If this Court cannot "inquire into the official conduct of the President, or heads of departments," "with a view to control them in their ministerial functions," it is not because this Court is established in this district "for purposes entirely local."

The suggestion that the President and heads of departments are not responsible, except by impeachment, for the exercise of their ministerial functions, seems to imply that the Postmaster-General, like the heads of departments, may shelter himself under the authority or command of the President. But if they can do it, in a case like the present, where the duty is expressly enjoined by an act of Congress, this officer cannot do it; for his relation to the President is very different from theirs. They, in the very terms by which their offices were created and their duties defined, are to perform such duties and execute such orders as they shall be required to perform and execute by the President of the United States. The Secretary of the Treasury, however, may possibly stand in a different relation to the President, as his duties are better defined by law, and as there is a direct communication, established by law, between him and the legislature, without the intervention of the President; but still he is bound by the second section of the Act of the 2d of September, 1789, "generally to perform all such services, relative to the finance, as he shall be directed to perform." The act does not say by whom he may be thus directed; if by the President, then his relation to the President is the same as that of the other heads of departments. The Postmaster-General, however, clearly bears no such relation to the President. We cannot find a word in the law under which he was appointed, or in the various laws respecting the post-office establishment, or in the Constitution of the United States, which intimates any connection between him and the President; or any authority in the President to prescribe his duties, or to control him in the exercise of his official functions.

It is true that he is appointed, and therefore may be removed, by the President. But the President, if he has the power to control him, can only do it through his fear of removal. If he should so control him, no act done by him under that control, could be thereby justified. The Postmaster-General, in the exercise of the duties of his office, appears to be legally as independent of the President as the President is of him. There can, therefore, be no pretence for avoiding responsibility under any order of the President, nor for showing the irresponsibility which may be supposed to belong to that high officer.

In what cases public officers are responsible to individuals for their official acts, or for the neglect of their official duties, is shown

very clearly in the opinion of the Supreme Court of the United States in the case of *Marbury v. Madison*, already cited.

We have thus endeavored to answer all the objections which have occurred to us as likely to be made; and our opinion upon the whole case, after the best and most anxious consideration, with a desire and determination to do justice between the parties, according to the best of our judgment and ability, is,

That the refusal of a public officer, resident in this district, to do a ministerial act which, by law, he is positively commanded to do, whereby an individual is deprived of his right, is a case, either in law or equity, of which this Court has cognizance, by virtue of the fifth section of the Act of the 27th of February, 1801, "concerning the District of Columbia." That the only adequate remedy, in the case presented to us, is a specific remedy; and that the only specific remedy is a writ of *mandamus*; which is a writ "agreeable to the principles and usages of law," and is "necessary for the exercise of the jurisdiction" of this Court, in the case before us. If this Court has not jurisdiction of the case, no court has; and an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined upon him by law, will be entirely without redress. Neither an impeachment nor an indictment could restore to him his lost rights; and in an action upon the case he could only obtain judgment for damages, which the officer might be wholly unable to pay.

The Court will order a writ of *mandamus* to be issued, commanding the Postmaster-General to credit the relators with the balance remaining due to them according to the award and report of the Solicitor, unless the Postmaster-General shall show cause to the contrary on or before the tenth day of June instant.

The question whether a *mandamus* shall issue commanding him to pay the balance, may be reserved for further consideration, when the result of the *mandamus* to credit the balance shall be ascertained.

The *mandamus nisi*, was accordingly issued and served on the 7th of June.

On the 10th of June, *Mr. Key*, Attorney for the United States for the District of Columbia, stated to the Court that *Mr. Kendall* was preparing a paper to be laid before the Court. That he had been unwell, and wished time till the 17th, which the Court granted.

Mr. Coxe, for the relators, suggested that an appearance for the Postmaster-General should be entered; but the Court said they could not permit his appearance to be entered until he had returned the writ.

On the 17th, *Mr. Key*, in behalf of the Postmaster-General,

asked for further time until the 24th, and laid before the Court the following letter :

Post-Office Department, June 17, 1837. F. S. Key, Esq., United States District Attorney. Sir,—You were kind enough, at my request, to induce the Circuit Court for this district, to suspend proceedings for a few days in the case of their *mandamus* against me, as Postmaster-General, to give time to prepare my reasons for declining to comply with their command.

Every day's inquiry and consideration magnifies the importance of the principles involved in this proceeding, and tends to the conclusion that it necessarily brings into discussion the constitutional and legal powers of two separate and independent departments of the government.

As the question interests every executive officer residing within the district, as well as myself, and affects the character of the entire executive department, I have not deemed it right to suffer myself to be governed altogether by my own impulses or opinions, and have taken the advice, as well of my official superior, as of the constitutional law officer of the government in relation to my duty to appear before the Circuit Court. It is their opinion that an appearance, with the avowed and sole object of contesting the jurisdiction of the Court, compromises no principle involved in the controversy, and is a proper mode of resistance to the claims of power set up in this case.

You are therefore requested and instructed to appear in the Court in my behalf as Postmaster-General, distinctly announcing to the Court that you do so only for the purpose of contesting their jurisdiction ; and that you are expressly instructed not to plead to, argue, or notice as counsel any point or fact in the case which does not affect that question.

You are aware that incessant devotion to the subject during the time allowed, has not enabled me to prepare the materials necessary to exhibit the grounds on which I disclaim the jurisdiction of the Court over the Postmaster-General, or any other executive officer acting in his official capacity. It cannot be the wish of the Court to precipitate their action in any case, and least of all in one of high constitutional law affecting their own rights and powers, as well as those of another department of the government ; and I leave it with you to suggest such further delay as may seem to you, with your present knowledge of the matter, to be necessary to complete the preparation of the case.

With high respect, your obedient servant, Amos Kendall, Postmaster-General.

The Court granted further time until the 24th of June to return the *mandamus*.

On that day the *mandamus nisi* was returned, with the follow-

ing paper, by way of showing cause why a peremptory *mandamus* should not be issued.

To the Hon. William Cranch, Chief Justice of the Circuit Court for the District of Columbia.

On the 7th instant the undersigned received by the hands of the Marshal of the District of Columbia, a writ of *mandamus* from the Circuit Court of the district, commanding him to credit Messrs. Stockton and Stokes and others, with a certain sum of money awarded to them by the Solicitor of the Treasury by virtue of authority alleged to be vested in him by a certain Act of Congress for their relief, passed on the 2d day of July, 1836, or to show cause why he has not so done as commanded.

The undersigned is unable to persuade himself that the performance of the act commanded would not, under existing circumstances, involve a violation of the oath he has taken, faithfully to discharge the duties of Postmaster-General according to law; and to support the Constitution of the United States.

Although his opinion of the powers and jurisdiction of this Court remains unchanged, yet that respect for the tribunal, which elicited his former communication, duty to himself, and the obligations he is under to vindicate and sustain the institutions of his country, impel him to present the reasons which have induced his present determination.

Before he proceeds with that exposition, he begs leave emphatically to disavow all intention or idea of claiming irresponsibility or immunity in the discharge of his official functions, or of shrinking from the most scrutinizing investigation by any legitimate authority, into his actions or his motives.

It is his pride to belong to a republic where no man is free from responsibility, however high, and where none is without protection or redress, however low. As a citizen it is his aim to perform his domestic and civil duties with strict regard to morality and law. As a public officer it is his most anxious endeavor to discharge every duty, which may be imposed upon him, with fidelity and zeal; in all capacities to encounter labor with patience, and responsibility without fear. If, in the attitude he now occupies in relation to this Court, there is that which every sensitive man would wish to avoid, he is sustained by a consciousness of right, under which circumstances cease to be painful and consequences become indifferent.

With these preliminary remarks, the undersigned proceeds to give his reasons for declining obedience to the order of the Court.

First reason. It is doubted whether the Constitution of the United States confers on the judiciary department of the government authority to control the executive department in the exercise of its functions of whatsoever character.

In the division and separation of powers the Constitution of the United States uses the following language, namely, "All legislative powers, herein granted, shall be vested in a Congress of the United States." "The executive power shall be vested in a President of the United States." "The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish." It gives the President power, by and with the advice and consent of the Senate, to appoint "Judges of the Supreme Court ; and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law," &c., and makes it his duty to "take care that the laws be faithfully executed." It is declared that the President, Vice President, and all civil officers of the United States shall be removed from office "on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors." And so careful is the Constitution to give the judiciary no control over the executive department, that, instead of subjecting executive officers to the courts for official offences and delinquences, it constitutes a special tribunal, in the Senate, for their trial in all cases of impeachment.

The plan of the Constitution will be more clearly understood, by a brief reference to the history and nature of the executive and judicial powers as they exist in our government.

In the country from which the principles of our system of government are measurably derived, the judiciary originally formed a part of the executive power. An exposition of the law is frequently necessary before it can be understandingly executed, and the judges were appointed by the king to give it. When given, he proceeded to carry it into execution. Over that execution the judges had no power ; it being effected by sheriffs, another set of officers wholly dependent on the king. To shield the subject from regal oppression the judges were finally made independent of the king, though removable by parliament ; but the sheriffs were still left at the monarch's will. The expounding functionary was rendered independent ; but the execution was still left to the king.

"In our system we have followed the modern English model. Our judges, after appointment, are independent of the executive ; but our district attorneys, who manage prosecutions, and our marshals, who execute the decisions, orders, and decrees of our courts, are not only appointed by the President, but hold their offices, from day to day, at his will. They are the instruments by which the President "takes care that the laws be faithfully executed," as expounded by the courts.

The sole constitutional function of the judges is to expound

the laws. It is the function and duty of the executive to see them faithfully executed. The necessity of a judiciary department arises solely from the impracticability of so framing the laws as exactly to fit every case which may arise in the endless diversity of human affairs. If the laws could be precisely adapted to every case there would be no necessity of a judiciary to expound them. The executive authority could proceed forthwith to carry them into execution. But most general, and some special laws require exposition before they can be understandingly executed. This is the judicial function. It is to declare what the law is and apply it to the case. When that is done the proper function of the judge ceases, and that of the executive commences. The duty of the marshal who is but a part of the executive department, is to execute the law as thus expounded.

Many special laws are not susceptible of any exposition. They apply directly to the case, and cannot be made plainer by any court. Nothing is needed, after their passage, but execution. Such are laws which appropriate sums of money to individuals; such are laws which require specific acts of executive officers. The intervention of the expounding function is not necessary in these cases, because it can make them no plainer. All that is to be done is to execute them. The officers who are to perform the duties enjoined are all made dependent on the will of the President, directly or indirectly, that he may, through his power over them, "take care" that each executes the laws in his appropriate sphere.

A distinction has been taken between those laws which prescribe special duties to executive officers and those which do not. It is said, the courts may compel the execution of the duties prescribed in the former, but not those prescribed in the latter. No such distinction is to be found in the Constitution. It is the duty of the President to "take care that the laws be faithfully executed;" special laws as well as general; but no such duty is enjoined upon the judiciary. The means furnished to the President, to cause the execution of the special laws, are more immediate and direct than those furnished him for the execution of the general laws. Does a special law require the head of a department to pay a sum of money? The officer, whose peculiar province it is to execute the law, is under the immediate eye of the President, holds office at his will, and may be removed if he refuses. So of the comptrollers, auditors, treasurer, register, commissioners of the land-office, of patents, of pensions, of Indian affairs, and the whole corps of executive officers at Washington. And the same principle embraces all executive officers throughout the Union. The executive power is one; one in principle,

one in object. Its object is the execution of the laws. It is not susceptible of subdivisions and nice distinctions as to its duties and responsibilities. To execute the laws, and all the laws, are its duties; and it is responsible for their faithful performance. The practical exercise of executive power is more remote in cases which go before the judicial tribunals; but it is the same in principle. The district attorneys hold their offices at the will of the President, as also do the marshals. It is not the behest of the judge that the marshal executes, but the law, passed by Congress, which the judge has merely expounded and applied to the case. It is the one executive power of the Republic, the President of the United States, through an officer holding office at his will, which steps in to execute the law when the judge has declared what it is and how it applies to the case. Laws, which require no exposition, are executed without the intervention of the judicial power. Laws which require exposition are executed after that exposition has been given by the judicial power; but in both cases the execution is, or should be, according to the Constitution, exclusively the work of the executive.

Over cases where the law prescribes special duties to executive officers, as such, in terms so plain as to admit of no exposition, their power does not extend. For instance: the law directs the President to cause \$50,000 to be paid to a merchant whose ship has been bought for the naval service. Here no judge could expound the law more clearly than the legislature has done it. The proper function of the judiciary cannot be called into requisition because there is no point upon which it can constitutionally act. Nothing is to be done but to execute the law. The President directs the Fourth Auditor to state an account; it is revised by the Second Comptroller; the Secretary of the Navy issues a requisition for a warrant; the Secretary of the Treasury issues a warrant, and the matter passes through the offices of the First Comptroller, the Register, and Treasurer. These officers are all made dependent on the will of the President, that through them he may take care that all such laws be faithfully executed. Suppose one of them should be perverse and obstinate, and refuse to execute the law, what would be the appropriate remedy, and who shall apply it? Could the merchant call on the courts to interfere when no expounding of the law is requisite? Or would he rather apply to the President, whose sworn constitutional duty it is to 'take care that the laws be faithfully executed?' Would he not request the President to issue his *mandamus* to his perverse subordinate, directing him to execute the law; and, if he still refused, to remove him from office and give his place to some one who would do his duty? The law could thus be executed, and the citizen obtain his right.

But suppose he goes to the judiciary for their *mandamus*, what will he ask them to do? Will he request the judge to expound the law for him? That is not necessary, it is clear enough already; all he wants is the execution of the law. Will he ask the judges to execute the law, or to "take care that the law be faithfully executed?" That is an executive function with which they have no right to interfere. Yet what else is the object of a *mandamus* in such a case? What is it but an executive measure; what else but taking the duties of the President out of his hands; what else but the assumption of a power which by the Constitution belongs exclusively to another independent department of the government?

Let this doctrine be followed out, and to what will it lead? The Constitution makes it the duty of the President to "commission all the officers of the United States," and the laws impose upon him many specific as well as general duties. The heads of departments have also many duties prescribed by law, special as well as general. We have auditors to settle accounts, comptrollers to revise them, a treasurer to issue checks drawn upon warrants, a register to register accounts and warrants, commissioners of the land-office, of patents, of pensions, and of Indian affairs, all of whom have specific as well as general duties, and all of whom have heretofore looked up to the President as their common superior; the head of the department to which they belong; to whom they are responsible, and whose duty it is to see that each of them faithfully executes the laws in his appropriate sphere. But this doctrine gives a new superior; a superior above the President, the highest representative of the majesty of the people, in this government; a superior which, in theory, may consign them all, from the heads of departments down to the messengers in the offices, to the county jail, if they refuse to regard the mandate of the court, in the performance of their executive functions.

Any item in an account, any specific act required by law, whether general or special, which can directly or indirectly affect a private right, (and there can scarcely be an executive act required by law which does not,) may be made the subject of the supervisory power; and the effective and controlling executive of this great Republic will not be the chief magistrate elected by the people, but the three judges of the Circuit Court for the District of Columbia.

But which would be the most effective in all such cases, the order of the President, or the *mandamus* of the judges? The President could at once accomplish the object by the obedience or removal of his subordinate. The judges have no effectual means of executing the law. They might imprison the executive

officer, but they could not remove him. Imprisonment might not accomplish the object. The Court could not guide his hand nor control his will. If he were conscientious in his refusal, or wished to appear so, no imprisonment, nor pains, nor penalties, could compel him to do an act which in his opinion violated his oath of office. The whole power of the Court would be impotent to control an honest man. The inadequacy of the judicial process, and the ample power vested in the President, are conclusive proof that the President and not the Court was intended to be the controlling authority in all such cases. So far as regards their execution, no distinction is made by the Constitution between special acts and general acts; between private acts and public acts. It is the duty of the President to take care that all alike "be faithfully executed." The executive is an unity. The framers of the Constitution had studied history too well to impose on their country a divided executive. The executive power was vested in a President. The executive officers are his agents, for whom he is held responsible by the people whose agent he is. The acts of the executive officers are the acts of the President. Constitutionally he is as responsible for them as if they were done by himself, though not morally.

So far as regards the execution of the laws, therefore, no distinction can be maintained between acts of the President and those of his subordinate officers. In law they are all acts of the President. When the judiciary attempt to control those acts, they attempt to control the executive power, to assume the functions of the President, to make themselves the executive in the last resort, superior to the executive created by the Constitution, and elected by the people.

Suppose the laws require a specific act of the President himself, involving private rights, which he refuses to perform. The courts have as much law for issuing a *mandamus* against him, as against any of his subordinates in a like case. It is a "case" as much as that of which the Court has already assumed jurisdiction. The President disobeys their *mandamus*, and they send an attachment. By whom do they send it? By a marshal holding his office at the will of the President, who can strike their process dead in his hands, by dismissing him on the spot. This fact proves the absurdity of the power assumed. And that which the President can legally do, to protect himself, he can do to protect any of his agents, being always responsible to his country for the proper exercise of his power.

But suppose the Court succeed in arresting the President, and put him in the county jail. Where then is the supreme executive power of this great Republic? Transferred from the President's

house to the city hall ; from the chief magistrate, elected by the people of the whole United States, to three judges for the District of Columbia.

The arrest and imprisonment of any executive officer, as such, involves the same principles, and would lead to the same consequences, in a greater or less degree, according to the importance of the station held by him. It is still an attempt to control the executive power ; not by confining its head, but by tying up its hands ; or rather by forcing the hands to work, not according to the will of their constitutional head, but in obedience to the will of another department of the government.

It is said that if the Court has not this power, 'an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined upon him by law, will be entirely without redress.' If it were even so, would it justify the court in assuming executive authority in violation of the Constitution ? It would but prove a defect in our institutions, which it would be incumbent on the people to repair. But it is not so. The idea that courts are the only places where wrongs of all sorts are to be redressed, and judges the only dispensers of right, is an error. Where the inferior executive officer, or even the President himself, refuses to perform his executive duties, there is an obvious mode of redress, without the interposition of the judicial authority. If a subordinate executive officer 'refuse to perform a ministerial act positively enjoined upon him by law,' the injured citizen may appeal to the President, whose duty it is to 'take care that the laws be faithfully executed,' and has power to turn out a perverse subordinate. If the case be so very plain, the President will, at once, enforce the execution of the law, and the citizen will have effectual redress, though 'this Court has not jurisdiction.' If the case be not so very plain, the matter may be referred back to Congress, to make it plain by further legislation ; and thus the citizen would have complete redress, without the aid of the Court. There is a process by which the President himself may be reached, for a perverse refusal to execute the laws, or take care that they be executed, and a chief magistrate, who will do his duty, put in his place.

Thus are there ample means provided by the Constitution to enable the citizen to obtain his rights at the hand of the executive without erecting any court into a supreme controlling power over the President and the whole corps of executive officers. Indeed the Court has not, in the Constitution and laws, the means to give redress in such cases. Before they can control the President, they must assume the power to appoint their own marshal and execute their own mandates. They must do more. They must

proceed to the executive offices; must enter credits with their own hands; must issue warrants; and finally, with their own hands, take the money out of the Treasury.

The very case before the Court illustrates the theory of the Constitution. The Postmaster-General refused to execute a part of the Solicitor's award, because he believed it contrary to law. Where did the relators first look for redress? Not to the Court, but to the President. The late President deemed the case a proper one for another application to Congress for further legislation, and refused to compel an execution of the award. The relators went to one house of Congress and procured the passage of a resolution in their favor; but no legislation. The cause was then again pressed upon the late President, whose views of it remained unchanged. It was afterwards pressed upon the present President, who considered the disposition made of it by his predecessor as final, so far as the executive was concerned, unless there should be further legislation. If the President, on either of these three occasions, had looked upon the law as clearly and imperatively commanding the payment of the money, he would have taken care to see it faithfully executed, and the relators would have had complete redress. If they had procured the passage of an explanatory act, or joint resolution, through both houses of Congress, sustaining their construction of the law, or requiring payment of the balance of the award, their redress would also have been complete.

These obvious constitutional and legal measures were resorted to by them; and it is only when they fail to obtain the interpretation of legitimate authority, that they apply to a court to erect itself into a tribunal of appeal from another independent department of the government.

Whether sound, or not, the views here expressed are not peculiar. Mr. Jefferson and Mr. Madison acted upon them when the former held the office of President and the latter that of Secretary of State. Mr. Jefferson has left on record his views of the case of *Marbury v. Madison*, now relied upon by the Court to sustain their claim to jurisdiction in this case. The following is a letter addressed by him to George Hay, prosecuting attorney in the case of Aaron Burr, namely:

“Washington, June 2d, 1807.

“To George Hay, — Dear Sir: While *Burr's case* is depending before the Court, I will trouble you from time to time, with what occurs to me. I observe that the case of *Marbury v. Madison* has been cited, and I think it material to stop, at the threshold, the citing that case as authority, and to have it denied to be law.

"1. Because the judges, in the outset, disclaimed all cognizance of the case ; although they then went on to say what would have been their opinion had they had cognizance of it. This then was, confessedly, an extrajudicial opinion, and, as such, of no authority.

"2. Because, had it been judicially pronounced, it would have been against law ; for to a commission, a deed, a bond, delivery is essential to give validity. Until, therefore, the commission is delivered out of the hands of the executive, and his agents, it is not his deed. He may withhold, or cancel it, at pleasure, as he might his private deed, in the same situation.

"The Constitution intended that the three great branches of the government should be coördinate and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch. A judge, I presume, cannot sit on a bench, without a commission, or a record of a commission ; and the Constitution having given to the judiciary branch no means of compelling the executive either to deliver a commission, or to make a record of it, shows it did not intend to give the judiciary that control over the executive, but that it should remain in the power of the latter to do it or not.

"Where different branches have to act, in their respective lines, finally and without appeal under any law, they may give to it different and opposite constructions. Thus, in the case of William Smith, the House of Representatives determined he was a citizen ; and in the case of William Duane, (precisely the same in every material circumstance,) the judges determined he was no citizen. In the cases of Callender and others, the judges determined the Sedition Act was valid under the Constitution, and exercised their regular powers of sentencing them to fine and imprisonment. But the executive determined that the Sedition Act was a nullity, under the Constitution, and exercised his regular power of prohibiting the execution of the sentence, or rather of executing the real law which protected the acts of the defendants. From these different constructions of the same act, by different branches, less mischief arises than from giving to any one of them a control over the others. The executive, and Senate, act on the construction that until delivery from the executive department, a commission is in their possession, and within their rightful power ; and in cases of commissions, not revokable at will, where, after the Senate's approbation, and the President's signing, and sealing, new information of the unfitness of the person has come to hand before the delivery of the commission, new nominations have been made and approved, and new commissions issued. On this construction I have hitherto acted ; on this I

shall ever act, and maintain it with the powers of the government against any control which may be attempted by the judges in subversion of the independence of the executive and Senate within their peculiar department. I presume, therefore, that in a case where our decision is, by the Constitution, the supreme one, and that which can be carried into effect, it is the constitutionally authoritative one, and that that by the judges was *coram non jndice*, and unauthoritative, because it cannot be carried into effect.

"I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law; and I think the present a fortunate one, because it occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive, that the doctrines of that case were given extrajudicially and against law; and that their reverse will be the rule of action with the executive. If this opinion should not be your own, I would wish it to be expressed merely as that of the executive. If it is your own also, you will of course give to the arguments such a development as a case, incidental only, might render proper.

"I salute you with friendship and respect. THOS. JEFFERSON."

Mr. Jefferson was still President at the time this letter was written. He declares that "the Constitution intended that the great branches of the government should be coördinate and independent of each other;" that "as to the acts which are to be done by either, it has given no control to another branch;" that "the doctrines of that case were given extrajudicially and against law;" that "their reverse will be the rule of action with the executive," and that he would "maintain" his construction of the Constitution, "with the powers of the government, against any control which may be attempted by the judges in subversion of the independence of the executive," &c.

In a letter to Judge Roane, dated September 6, 1819, Mr. Jefferson adverts to this case, and the principles involved in it in the following terms, namely: "In the case of *Marbury & Madison*, the federal judges declared that commissions signed and sealed by the President were valid, although not delivered. I deemed delivery essential to complete a deed, which as long as it remains in the hands of the party, is, as yet, no deed; but it is *in posse* only; but not *in esse*; and I withheld delivery of the commissions. They cannot issue a *mandamus* to the President, or legislature, or any of their officers, the Constitution controlling the common law in this particular."

Again, as late as June 12th, 1823, in a letter to Judge Johnson, Mr. Jefferson speaks thus of this case, namely: "The prac-

tice of Judge Marshall, of travelling out of his case, to prescribe what the law would be in a moot case, not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly, perhaps, because it, in some measure, bore on myself.

“ Among the midnight appointments of Mr. Adams, were commissions to some federal justices of the peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the department of state, on my entrance into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a *mandamus* to the Secretary of State, (Mr. Madison,) to deliver the commission intended for him.

“ The Court determined at once, that, being an original process, they had no cognizance of it, and there the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit, that they should command the delivery. The object was clearly to instruct any other court, having the jurisdiction, what they should do if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could any thing exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. Although signed and sealed, yet, as long as it remains in the hands of the party himself, it is *in fieri* only, it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an *escrow*. But whatever is in the executive offices is certainly deemed to be in the hands of the President, and, in this case, was actually in my hands, because when I countermanded them, there was, as yet, no Secretary of State. Yet this case of *Marbury v. Madison* is continually cited by bench and bar, as if it were settled law, without any animadversion of its being merely an *obiter* dissertation of the chief justice.”

Mr. Jefferson even denied the power of the courts to compel the attendance of the President or heads of departments as witnesses in suits at law, or criminal prosecutions, at whatever distance; on the ground that their constitutional duties in the service of the people of the United States, were paramount to all others. When, in the case of *Smith v. Ogden*, in New York, a subpœna was issued to some of the heads of departments, they were directed by him to attend to their official duties, and disregard it. When the order of the President was stated in court as the ground of disobedience, a motion was made for an attachment, on the ground that it was insufficient, but the motion failed upon an equal division of the court.

In the case of Aaron Burr, a subpoena was issued by the court for the President, which he disregarded and returned. The following are his remarks upon it, in letters to the district attorney, namely :

“The leading principle of our Constitution is the independence of the legislature, executive, and judiciary, of each other. And none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, and to imprisonment for disobedience ; if the several courts could bandy him from pillar to post ; keep him constantly trudging from North to South, and East to West, and withdraw him entirely from his constitutional duties ? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others ; and to none has it given more effectual or diversified means than to the executive.

“I received late last night your favor of the day before, and now reinclose you the subpoena. As I do not believe that the district courts have the power of commanding the executive government to abandon superior duties, and attend to them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous.”

If the courts cannot take the executive officers from their public duties, even to testify in court in criminal cases, much less can they, at the instance of citizens in pursuit of private rights, subject them to *mandamus* and attachment.

These authorities are sufficient to show, that the doctrine laid down by the Chief Justice in the case of *Marbury v. Madison*, never was recognized as law by the executive authority. They will also screen the undersigned from the imputation of assuming any new ground, when he doubts whether this Court, or any other, can “issue a *mandamus* to the President or legislature, or any of their officers, the Constitution controlling the common law in this particular.”

All this reasoning and these deductions the undersigned begs may be understood as applicable solely to the public character and acts of executive officers, and not to their character as citizens, or to their private transactions.

Second reason. If, according to the Constitution, the Circuit Court for the District of Columbia might be clothed, by law, with the power to issue a *mandamus* in such a case, no such power has been conferred upon them by the Acts of Congress.

The undersigned is spared the labor of investigating and illustrating this position, by the clear, and, he thinks, conclusive,

opinion of the Attorney-General, which he transmits herewith, and requests that it may be considered a part of this letter. That opinion reviews the opinion of the Circuit Court, as delivered by Chief Justice Cranch, and published in the National Intelligencer, and maintains the following positions.

1. That the argument of the Court in favor of the jurisdiction claimed by them, is founded on inferences from the language of Judge Johnson, in the case of *McIntire v. Wood*; which inferences were repudiated by the same judge, and by the judgment of the court in a subsequent case.

2. That there is no substantial difference between the words of the Judiciary Act of 1789, which the Supreme Court have twice decided do not give the other circuit courts power to issue a *mandamus* to an executive officer, and the words of the 5th section of the act concerning the District of Columbia, on which the Circuit Court rely; and that the jurisdiction of the latter is, therefore, in this respect, no greater than that of the other courts.

3. That no power is to be derived from the Act of the 13th of February, 1801, because that act was repealed in 1802, without any exception as to the Circuit Court of this District.

4. That even if the acts of Congress, concerning this Court, had given to it, in express terms, a jurisdiction to issue writs of *mandamus* to an executive officer, to compel him to perform an official act, no such jurisdiction could be exercised consistently with the provisions of the Constitution; because such a jurisdiction would be, substantially, an exercise of executive power, which cannot be taken from the President, in whom the Constitution has vested it.

5. That the Postmaster-General is an executive officer, and equally independent, with the other heads of the executive departments, of any control, in the exercise of his official duties, by the judiciary.

Third reason. If, by the Constitution, Congress can clothe the courts with authority to issue writs of *mandamus* against executive officers, as such; and if they have vested the general power in this Court, by law, this is not a case in which that power can be lawfully exercised.

1. It seems to be conceded that a writ of *mandamus* will not lie to compel any one to do an act, in relation to the performance of which he has any discretion; and to bring this case within that principle, the Court say, "the duty of the Postmaster-General, under that act, is clear and absolute, leaving him no discretion." Is this so?

The act does not require the Postmaster-General to credit or pay any specific amount. It does not absolutely require him to

do any specific act whatsoever. Whether he would be called upon to credit much, or little, or nothing at all, was altogether contingent, depending on the solicitor's award. It was not like a law directing specifically and absolutely the payment of a sum of money, or the performance of a ministerial act, where the law is the only guide. It was necessary for him, in this case, to look at the law, and at the Solicitor's award. Of necessity, he must compare them together to ascertain what it was his duty to do. Now, in making that comparison, and acting upon the result, has he no discretion? The authority of the Solicitor, by the words of the law, was, "to settle and adjust" the claims of the relators "for extra services," "under certain contracts made with them by W. T. Barry," &c., to inquire into and determine the equity of their claims "for or on account of any contract" with the said Postmaster-General, "on which their pay had been suspended by the present Postmaster-General," and to make them such allowances, &c. The duty of the Postmaster-General is prescribed in the following words:

"And that the Postmaster-General be, and he is hereby directed to credit such mail contractors with whatever sums of money, if any, the said Solicitor shall so decide to be due to them," "for or on account of any such service or contract."

The Postmaster-General was not required to credit the contractors with all the Solicitor might award them, but only so much as he might decide to be due "for or on account of such service or contract." What "service or contract?" Why, the "service or contract" described in the preceding part of the act, "extra service;" a "contract" with W. T. Barry; a contract "on which the pay had been suspended by the present Postmaster-General." It is such allowances, and such only, that the Postmaster-General is directed to credit. Has he no power to examine and decide whether the allowances are of this character or not? Must he not see whether they are "for or on account of any such service, or contract," or not? If he have no power to look into that point, why are the words attached to the sentence which prescribes his duty? Why was he not directed absolutely to credit whatever sums of money, if any, the Solicitor shall decide to be due to them? But one answer can be given. It was the purpose of Congress to limit the power of the Postmaster-General to credit and pay, as well as of the Solicitor to allow; and, after defining the claims which the latter was authorized to allow, they limited, to the same claims, the power of the former to pay. He was directed to pay the sums allowed "for and on account of any such service or contract," and nothing more.

Again, there are several provisos to the act, limiting the power of the Solicitor. One of them is as follows: "Provided the said Solicitor is not authorized to make any allowance" "for any suspension or withholding of money, as aforesaid, for allowances or over-payments made, as aforesaid, on the route from Baltimore to Washington, under the contract of 1827." If, instead of 1827, the year 1831 had been used in this proviso, it would have covered a part of the allowances embraced in the award. Had it done so, and had the award embraced that, or any other allowance prohibited by the provisos, would it not have been the duty of the Postmaster-General to refuse the credit and payment? It cannot be doubted. But how could he ascertain whether the allowance was prohibited by the proviso, or not? Could he do it in any other way than by examining the allowance and comparing it with the proviso? If, in his opinion, it were prohibited, he would refuse to pay it; if not, he would pay it. And is there not discretion here? May he not pay, or refuse to pay, according to his opinion of the power of the Solicitor to make the allowance?

On these points, there can be no doubt that the Postmaster-General has a discretion. But what is the difference between his right to determine whether the Solicitor has transcended his power on specific points, or in his award generally? Had he not a discretion to refuse to pay the whole award, or any part of it, if he honestly believed it to be contrary to law? If, on looking at the law and the award, he found that the Solicitor had departed from his authority altogether, it cannot be doubted that he had a right, under the law, and that it would have been his duty to decline carrying it into effect.

This is not a case, therefore, where a specific duty is enjoined by law, in the performance of which there is no discretion, such as the payment of a definite sum of money, the registering of a certificate, or the recording of a patent, and consequently it is not a proper case for a *mandamus*.

It seems to be conceded, that under existing laws a writ of *mandamus* can be issued by a court only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction.

Let us apply the principle to this case. The jurisdiction of every court must be original or appellate. Original jurisdiction is where, by authority of the Constitution and laws, proceedings are originated in the court in the first instance. Appellate jurisdiction is where, by authority of the same Constitution and laws, a case is taken out of a lower tribunal into a higher, with a view to a revision of the proceedings of an inferior court.

In this case, the Circuit Court of the district had no original

jurisdiction to adjudicate upon the claims of the contractors. There was no mode known to the laws by which they could prosecute those claims in any court whatsoever. Congress created a special tribunal for that purpose. They made the Solicitor of the Treasury a chancellor for the special object, and clothed him with power to take evidence, and adjudicate upon the claims of the contractors. No other court on earth could have entertained this case. Nor was any appeal from the decision of this special court provided for by the law which created it. Neither the Circuit Court of this district, nor the Supreme Court of the United States, nor any other judicial tribunal, had power to bring up the case from the Solicitor of the Treasury, either before or after his award, and revise his proceedings. No judge could take from or add to the amount of his award; nor has any judge the legal power to say whether that officer decided according to law, or against law. The solicitor's power, in this case, was equal to that conferred on the Supreme Court of the United States, in cases subjected to its jurisdiction, and above that of the Circuit Court for the District of Columbia, from which there is an appeal. The Solicitor had as much power, under the law which gave him jurisdiction to issue a *mandamus* to bring before him, for consideration or revision, a case acted on in the District Court, or the Supreme Court, as either of them has to issue a *mandamus* to bring before them, for consideration or revision, a case decided in his court; and he has as much right to interpose by a *mandamus* to execute their judgment, as they his. How then do the Circuit Court get jurisdiction in this case? Not by law; for the law gives them none, either original or appellate. They obtain it by the *mandamus*, and by that only.

It is said that they do not claim jurisdiction to inquire into and revise the Solicitor's award. What then does their jurisdiction amount to? What case is this where the jurisdiction is not to inquire into, to revise, to adjudge, but merely to execute? In the ordinary routine of judicial proceedings, the "case" comes first, the "suit" follows, and "judgment" closes the rear. Here it is not a "case" nor a "suit" of which the court takes cognizance, but a "judgment." It is the judgment and award of another independent court, upon the proceedings of which the law gives neither resort nor appeal to the District Court. And if the court do not intend to look into the award of the Solicitor, to ascertain whether it be according to law, or against law, what do they mean by calling on the Postmaster-General to give his reasons for not carrying it into execution? If they mean any thing by such a call, it must be that they will consider the reasons which may be adduced by him, and decide whether they be suffi-

cient or not. Suppose the Postmaster-General were to allege that the Solicitor had considered and allowed claims, which he was not authorized to allow by the Act of Congress, from which he derived his authority. If this were true, it would certainly be a good reason for not paying the award. But could the Circuit Court inquire into their truth? Whence do they derive the power to inquire or decide whether the Solicitor allowed too much or too little; whether he adhered to the law, or transcended the law; whether he awarded to the claimants a just compensation for services actually rendered, or heaped upon them tens and hundreds of thousands without shadow of contracts or pretence of service? Nothing would seem more plain than that the Court have no power to call for books and papers, or summon witnesses, or consider statements, with a view of deciding whether the award of the Solicitor be right or wrong. If they have no such power, it is palpable that they cannot make any examinations, and come to any decision which can exonerate the Postmaster-General from executing the award, however illegal or monstrous may be the allowances which it sanctions.

Is not this absence of power to consider that, which may be a good reason for the Postmaster-General's refusal to execute the award, the strongest possible proof that the Court have no authority to institute their present proceedings? It will be admitted by all, that if the Postmaster-General could show that the award was illegal, or corrupt, it would be a good excuse for not carrying it into effect until it could be revised by some superior tribunal. But this court, not being clothed by law with power to consider those points, has no authority to judge of the legality or reasonableness of the Postmaster-General's excuses, although they may be such as not only to justify him, but to entitle him to commendation.

No man will deny that cases may and do arise, in which an executive officer is perfectly justified in refusing to perform a specific act required of him by law. In these cases, he is responsible to his superior, and to Congress, but not to the courts. If the Postmaster-General were directed by express law to pay \$50,000 to a contractor, and should, before doing so, discover that the passage of the Act of Congress had been procured by false and fabricated testimony, it would be his duty to refuse payment until the whole subject could be again brought under the revision of Congress. Yet the law might be plain and peremptory in its terms, leaving him no discretion. Must not this Court, upon the principles laid down by them, grant a *mandamus* to the claimant? Could they, in such a proceeding, inquire into and revise the Act of Congress, or would they peremptorily order, and forcibly com-

pel the Postmaster-General to execute the law, the fraud notwithstanding? If he had no "discretion," and they no power of revision, such must be their decision.

Hence it is inferred that the Court has no jurisdiction of this case in law, and can only obtain, what they may exercise by their *mandamus*,—a proof that a writ of *mandamus* will not lie in such a case.

Fourth reason. The Court have ordered the Postmaster-General to perform a legal impossibility.

A *mandamus* is a command to do a specific act. The specific act, ordered to be done in this case, is, to credit the relators with the full amount of the Solicitor's award. A credit can only be given by an entry upon some book in which their accounts are lawfully kept. No accounts are kept with contractors in the Post-Office Department, nor has the Postmaster-General the custody or control of the books in which they are kept.

All the accounts of the Post-Office Department are kept in the Treasury Department by the auditor created for that purpose, by the Act of July 2, 1836, [5 Stat. at Large, 80.] That officer is appointed by the President and Senate; and so far is he from being dependent on the Postmaster-General, that his clerks are appointed by the Secretary of the Treasury. To his office have been transferred, long since, all the accounts, and the books connected with them, formerly kept by the Postmaster-General.

By adverting to the fact, that the act for the relief of Messrs. Stockton and Stokes, &c., and that to change the organization of the Post-Office Department, passed on the same day, the occasion of this practical discrepancy between them will be understood.

The former was drawn with reference to the organization of the department at the time of its introduction into Congress. Then, the Postmaster-General kept the accounts; and the entries in the books were his entries. He had the legal power and authority to give a credit to the contractors in this case. But this power and authority was taken from him by another act on the day the act for their relief passed. That the act, now in question, was not altered so as to accommodate it to the change, and require the credit to be given by the new auditor, instead of the Postmaster-General, was, doubtless, an inadvertence; but it is one which the legislative authority alone can correct.

"As the law stands, the Postmaster-General has just as much authority to make entries in the books of the Second, Third, and Fourth Auditors, as he has in those of the auditor created by the Act of 1836. Hence the Court will perceive that they have ordered the Postmaster-General to do that which he cannot law-

fully do,—to enter a credit or credits on books of which he has neither the custody nor control.

These views the undersigned submits to the Court with much confidence in their soundness. He thinks it is shown,

1. That it is the function of the executive “to take care that the laws,” special as well as general, “be faithfully executed ;” and that of the judiciary, to expound such as require it. That to the President of the United States, and not to the courts of justice, belongs the duty of directing and controlling all executive officers in the performance of their official duties ; and that, when the courts interpose to control them, they assume an executive function, invade the province of the President, and subvert the constitutional assignment of powers.

2. That Congress have not conferred, or attempted to confer, on the Circuit Court for the District of Columbia, authority to issue a writ of *mandamus* for the purpose of controlling executive officers in the performance of their duties, whether general or specific. That the Postmaster-General is an executive officer ; that in the matter, upon which this proceeding has originated, he has acted in that capacity ; and that he is not lawfully controllable therein, by a writ of *mandamus*.

3. That in the case before the Court, the Postmaster-General had a clear and undoubted discretion, in the exercise of which he is amenable to no judicial tribunal ; and that the Court, having no jurisdiction of the matter in question, either original or appellate, cannot lawfully court and obtain it by *mandamus*.

4. That the Court have ordered the Postmaster-General to do that which he has no lawful power to do ; not having official custody or control of the books on which the credits are commanded to be entered.

In addition to these persuasive considerations, it cannot be forgotten that the power, now asserted, has been slumbering from the birth of the Constitution ; and now, about half a century from the organization of the government, is for the first time called into requisition. How was it that Marbury, after his right to his commission was so strongly asserted by the Supreme Court, did not bethink himself of a resort, for redress, to the Circuit Court for the District of Columbia ? Why is it that the numberless claimants, whose accounts have been rejected at the Treasury, though asserted by them to be clearly warranted by law, have not applied to this Court for its *mandamus* to compel the auditors and register to give them credits upon their books ? Why did not the Bank of the United States, instead of agitating the country, and thundering in the capitol, apply to this Court for its *mandamus* to compel the Secretary of the Treasury to restore the public de-

posits which, it was alleged, had been removed from it, in contempt of law, and in violation of the Constitution? Have none of these occasions been sufficient to rouse this giant power from its enduring slumber? Are its mighty arms to be flung aloft, for the first time, in vindication of Post-Office extra allowances, of doubtful legality, and undoubted enormity, which have already been denounced by Congress, and condemned by the nation?

The undersigned desists from a theme, on which it is not pleasant to dwell. It has been his studied effort to avoid, as far as possible, expressions calculated to wound sensibility, or create excitement. The voice of reason alone is worthy of a subject so comprehensive and so grave. If a sentence or a word is to be found, in this paper, which can justly be construed as disrespectful to the Court, or personally reproachful to any one, it has escaped through inadvertence, and conveys a meaning which was not intended.

AMOS KENDALL, *Postmaster-General*.

June 24, 1837."

The following is the letter of Mr. Butler, the Attorney-General, referred to as part of the answer of the Postmaster-General.

Attorney-General's Office, June 19th, 1837.

Sir: I have had the honor to receive your letter of the 7th instant, inclosing a printed copy of the opinion delivered by the Chief Judge of the Circuit Court of the District of Columbia, for the county of Washington, upon the application of William B. Stokes and others, for a writ of *mandamus*, to be directed to the Postmaster-General of the United States; and requesting me to examine it, and inform you whether I find any thing therein to change the opinion heretofore expressed by me, relative to the jurisdiction of the Court over the matter in question.

Pursuant to this request, I have examined the paper referred to me, with the attention and respect due to its author, and to the Court of which he is the organ; but after the fullest consideration which I have been able to give to the arguments contained in it, I still adhere to the opinion, that the Court had no power to issue the writ in question.

The case proposed by you in your communication of the 29th ultimo, and now presented, relates to the power of the Circuit Court of this District to issue a *mandamus* to the Postmaster-General, an executive officer of the United States, for the purpose of compelling him to perform an official act alleged to have been enjoined upon him by a special Act of Congress passed for the relief of the parties applying for the writ. This act treats, exclusively, of certain claims depending in the Post-Office Department, and growing out of contracts with the Department. It refers these claims to the Solicitor of the Treasury, for settlement; and

it directs the Postmaster-General to credit the contractors with whatever sum of money, if any, the Solicitor shall decide to be due them. The duty, imposed by this law, is, therefore, in every sense, an official duty. It relates to the business of his department; it is imposed on him by his name of office. The Solicitor of the Treasury has made an award, by which he decides that certain sums of money are due to the contractors; and the Postmaster-General has credited them with a part of these sums, but, for reasons satisfactory to his own judgment and sense of duty, has refused to credit the balance, until directed so to do by a further act of Congress. The contractors have applied to the late President of the United States, to take order, by virtue of his constitutional duty to see the laws faithfully executed, for crediting the balance; but, being satisfied with the course of the Postmaster-General, he declined making any such order, and referred the parties to Congress for further legislative directions. The like application has been made to the present Chief Magistrate, who deemed it inexpedient to interfere with the disposition of the subject made by his predecessor; and the parties now apply to the Circuit Court of this district for an order, in the form of a writ of *mandamus* to the Postmaster-General, to credit and pay the balance of the Solicitor's award; on the ground that this is a mere ministerial act, to the performance of which the applicants have a fixed legal right, under the Act of Congress, as it now stands, and for which they have no other adequate legal remedy. The Court has so far adopted these views as to issue an alternative *mandamus*, commanding the Postmaster-General to give the credit applied for, or to show cause why he has not done so; but it has reserved the question whether the *mandamus* shall issue to command the payment of the balance, for further consideration, when the result of the first writ shall have been ascertained.

In my former communication it was shown, that, according to the decisions of the Supreme Court of the United States, in the cases of *McIntire v. Wood*, (7 Cranch, 504,) and *McClung v. Silliman*, (6 Wheat. 598,) the Circuit Courts of the United States, out of the District of Columbia, have no jurisdiction, under the laws now in force, to issue a writ of *mandamus* to an officer of the executive departments; and the opinion was expressed that the acts of Congress, organizing the Circuit Court of this district, and regulating its jurisdiction, though they conferred some powers not delegated to the other circuit courts, did not, in express terms, or by any general grant of power, authorize it to issue a writ of *mandamus* to an executive officer of the United States; and therefore that its jurisdiction, in this respect, was the same with that of the other circuit courts.

The character and effect of the decisions referred to, as to the other circuit courts, and the necessity of proving, before the writ applied for can be issued by the Circuit Court of this district, that Congress have conferred on it a jurisdiction, in this particular, not possessed by those courts, are fully admitted in the opinion before me; and the Court would doubtless have come to the like conclusion with me, had it taken the like view of the acts of Congress regulating its jurisdiction.

The opinion maintains that the power and jurisdiction conferred on this Court are much more comprehensive than those possessed by the other circuit courts, and sufficiently so to include the power in question. To establish this, a comparison is instituted between the acts of Congress relative to these courts; and the result of this comparison, aided by inferences and reasonings thereon, drawn from the language of the Supreme Court, in the cases referred to, is supposed to be in favor of the jurisdiction claimed by this Court.

The result, in my opinion, is directly the reverse. The power and jurisdiction of the ordinary circuit courts, so far as regards this subject, depends on the following clauses of the 11th and 14th sections of the Judiciary Act of 1789.

The 11th section provides, "that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners, or an alien is a party; or the dispute is between a citizen of the State where the suit is brought, and a citizen of another State."

The 14th section enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

On these provisions, the Supreme Court held, in the case of *McIntire v. Wood*, (7 Cranch, 504,) that the Circuit Court of Ohio did not possess the power to issue a *mandamus* to the Register of the Land Office. The power of the circuit courts, under the general words of the 14th section, to issue writs of *mandamus*, in some cases, was not denied; but it was held that the power was confined exclusively to cases in which the writ might be "necessary to the exercise of their jurisdiction." By this was meant, as explained in the subsequent case of *McClung v. Silliman*, (6 Wheat. 598,) that the *mandamus* can only be

issued "in cases where the jurisdiction already exists, not where it is to be courted or acquired by means of the writ proposed to be sued out."

The powers and jurisdiction of the Circuit Court of the District of Columbia, so far as regards the present question, are conferred by the third and fifth sections of the "Act concerning the District of Columbia," approved February 27th, 1801.

The material part of the third section is as follows: "That there shall be a court, in the said district, to be called the Circuit Court of the District of Columbia; and the said court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the Circuit Courts of the United States."

The fifth section is in the following words: "That the said court," (the Circuit Court of the District of Columbia,) "shall have cognizance of all crimes and offences committed within the said district, and of all cases, in law and equity, between parties, both or either of which shall be resident, or shall be found within the said district; and also all actions or suits of a civil nature, at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land and water, and all penalties and forfeitures, made, arising, or accruing under the laws of the United States."

On the latter of these sections (the fifth,) Judge Cranch holds that it confers on the Circuit Court of the District of Columbia a jurisdiction not given to the other circuit courts, which may be enforced by a writ of *mandamus*, whenever such a writ is necessary to the exercise of that jurisdiction. This view of the case appears to have been suggested by the following remarks of Mr. Justice Johnson, in the case of *McIntire v. Wood*: "Had the eleventh section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power, (the power of issuing writs of *mandamus*,) in many cases where some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the fourteenth section of the same act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain special cases."

In order to bring the case within these remarks, Judge Cranch argues that the fifth section, above quoted, has covered the whole ground of the Constitution of the United States, and much more, except as to certain cases not material to the present discussion; and that, with such exception, the Circuit Court of the District of

Columbia has cognizance of all cases, in law and equity, whether arising under the Constitution or laws of the United States, or under the adopted laws of Virginia and Maryland, with the only condition, that one of the parties shall be resident or found within the district ; and that the Circuit Court of the District of Columbia is, therefore, in that condition, of which Mr. Justice Johnson speaks. He also argues, chiefly on the authority of a part of the opinion of Chief Justice Marshall, in the noted case of *Marbury v. Madison*, 1 Cranch, 163, that the Act of Congress, for the relief of the relators, directs the performance, by the Postmaster-General, of a mere ministerial act ; that the right of the relators, and the obligation of the Postmaster-General, are clear and absolute ; that the refusal of the latter to perform the act, makes a case in law, of which the court has jurisdiction ; that the only appropriate remedy is by writ of *mandamus* ; that this writ is, therefore, necessary to the exercise of the jurisdiction of the Court ; and that the Court has not only the power, but is bound, to issue it.

The whole of this argument rests on the assumption, that if the grant of jurisdiction covers the whole ground of the Constitution, it will include the power to issue a writ of *mandamus* to an executive officer, commanding the performance of an official act, provided the Court shall be of opinion that such act is merely ministerial in its nature ; an assumption inferred by the court from the above quoted words of Judge Johnson. I shall, hereafter, have occasion to show that the existence of such a jurisdiction, in any of the courts, is incompatible with the distribution of the powers of government made by the Constitution, and with the separate and independent authority vested by it in the President ; but before entering upon that subject, some objections of a minor, but perhaps not less decisive nature, may be mentioned.

1. The above quoted observation of Mr. Justice Johnson was not necessary to the decision of the case of *McIntire v. Wood* ; and the use, now made of it by the Circuit Court, appears to be repugnant to the opinion of the same judge, in the case of *McClung v. Silliman*, and to the judgment rendered in the latter case.

The existence of this objection is fully admitted by Chief Justice Cranch, in the following remarks : “ But although we have shown, as we think, that, even under the opinion of the Supreme Court in *McIntire v. Wood*, this Court has power to issue a writ of *mandamus* in the present case, yet it may possibly be objected that our argument is founded upon inferences, drawn from the language of that opinion ; which inferences, Mr. Justice Johnson, in the case of *McClung v. Silliman*, 6 Wheat. 598, repudiates.”

Let us see how the objection is gotten over.

In the first place it is suggested that, "the only point, decided in the case of *McClung v. Silliman*, was, that a State Court cannot issue a *mandamus* to an officer of the United States." And the remarks of Judge Johnson, repudiating the inferences referred to, are treated as unnecessary to the decision of the cause.

If this were so, it might still be replied, that the *obiter* remarks of the judge who delivered the opinion of the Court, repudiating inferences drawn from *obiter* remarks of the same judge in a former case, are abundantly sufficient to meet an argument founded on such inferences. But I think it will be seen, by comparing Judge Johnson's statement of the facts with subsequent parts of his opinion, that the case presented another point which directly called for the remarks in question.

Mr. Justice Johnson says, "The plaintiff in error, who was also the plaintiff below, supposes himself entitled to a preëmptive interest in a tract of land in the State of Ohio, and claims, of the Register of the Land-Office of the United States, the legal acts and documents upon which such rights are initiated. The officer refuses, under the idea that the right is already legally vested in another, and that he possesses, himself, no power over the subject in controversy.

"A *mandamus* is then moved for in the Circuit Court of the United States, and the Court decides that Congress has vested it with no such controlling power over the acts of the ministerial officers, in the given case. The same application is then preferred to the State court for the county in which the subject in controversy is situated. The State court sustains its own jurisdiction over the Register of the Land-Office; but on a view of the merits of the claim, dismisses the motion. From both these decisions, appeals are made to this Court, in the form of a writ of error." He then refers to the decision in *McIntire v. Wood*; says, the influence of that decision on the cases before the Court is resisted on the ground that it did not then appear that the controversy was between parties who, under the description of person, were entitled to sue in the Circuit Court of the United States; and that "it is now contended that, as the parties in this controversy are competent to sue under the 11th section, being citizens of different States, that this is a case within the provisions of the 14th section, and the Circuit Court was vested with power to issue this writ, under the description of a writ not specially provided for by statute, but necessary for the exercise of its jurisdiction."

It thus appears that, besides the question concerning the power of the State Court, the question whether the Circuit Court of the United States for the State of Ohio could issue a *mandamus* to a Register of the Land-Office, to decide conflicting claims to a certi-

ficate of purchase; one claimant being a citizen of Ohio, and the other a citizen of another State, was also submitted for decision. The argument of the plaintiff's counsel in support of such a jurisdiction, like that of the Circuit Court of this District in the present case, was founded on inferences drawn from the language held by Judge Johnson in the case of *McIntyre v. Wood*. The judge notices it at length; rejects, in the most decided manner, the inferences on which it rested; and thus disposes of that part of the case which related to the proceedings before the Circuit Court.

Another answer to the anticipated objection is, that the Circuit Court of this district has cognizance of all cases in law and equity, however arising, between parties, both or either of which are resident, or found within the district; a position constantly insisted on in the opinion, and which I propose to examine under the next head.

2. Admitting, for the sake of argument, that the construction, given to the language of Judge Johnson in the cases referred to, is the correct one, and that the argument founded on it is sound in principle, still the present case cannot be distinguished from those decided by the Supreme Court, because there is no essential difference between the 5th section of the act "concerning the District of Columbia," on which the Circuit Court relies for its claim of jurisdiction over all cases in law and equity, however arising, and the 11th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] which prescribes the jurisdiction of the other courts.

The material words of the 5th section, omitting other classes of cases are, that the Circuit Court of this district shall have cognizance "of all cases in law and equity, between parties, both or either of which shall be resident, or shall be found within the said district."

Those of the 11th section, omitting value and alternative cases, are, that the Circuit Courts of the United States shall have cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute is between a citizen of the State where the suit is brought, and a citizen of another State."

Except, that in the other circuit courts it is requisite that one party should be a citizen of the State where the suit is brought, and the other party a citizen of another State; and that in this district, it will be sufficient, if either of the parties be resident or found here; there would seem to be no substantial difference between the two provisions. Indeed, unless the phrase, "all cases in law and equity," used in the one case, means something different from "all suits of a civil nature, at common law or in equity,"

used in the other, it is certain that there can be no such difference, and consequently that the power and jurisdiction of the Circuit Court of this district, in regard to the writ of *mandamus*, so far as depends upon the 5th section above quoted, are precisely the same with those of the other circuit courts.

It may be inferred from the opinion of the Circuit Court, that the former of these phrases was supposed to mean something more comprehensive than the other; and so much more so as to cover the whole ground of the Constitution, which it was adjudged in *McIntyre v. Wood*, that the other phrase did not do. No reason is very distinctly assigned for this distinction; but it appears to rest on the use of the word "cases," in that clause of the Constitution which provides that the judicial power of the United States "shall extend to all cases in law and equity under the Constitution and laws of the United States," &c. But, according to the Supreme Court of the United States, and to the opinions of other expositors of the Constitution, the word "case" in this section, means neither more nor less than the word "suit." Mr. Justice Story, in his Commentaries, (vol. 3, p. 507,) in answer to the inquiry, what constitutes a case within the meaning of the clause, remarks, that a case, in the sense of this clause, arises when some subject touching the Constitution, laws, or treaties of the United States, is submitted to the courts by a party who asserts his rights in a form prescribed by law. In other words, a case is a suit at law or in equity instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." And for this, he cites the decisions of the Supreme Court, and other authorities. On the other hand, the Supreme Court held, in 2 Peters, 464, that the word "suit" used in the 25th section of the Judiciary Act, applies to any proceeding in a court of justice, by which an individual pursues that remedy, in a court of justice, which the law allows him. It seems, therefore, to be settled that the words are, substantially, convertible terms; the one referring to the subject-matter of a judicial proceeding, and the other to the proceeding on such subject-matter. The words of the two acts being substantially the same, can there be any difference in their legal effect? And if the words used in the 11th section of the Act of 1789, [1 Stat. at Large, 73,] do not cover the whole ground of the Constitution, and therefore do not authorize the issuing of a *mandamus* to an executive officer of the United States, as an original remedy, as has been adjudged by the Supreme Court, how, without overruling the decisions of that Court, can words of precisely the same import in the 5th section of the Act of 1801,

[2 Stat. at Large, 103,] be held to cover that whole ground, and to authorize the issuing of such a writ ?

It may be admitted that, under the words above quoted from the 5th section, taken in connection with the first section of the same act, which declares that the laws of Virginia and Maryland, as they existed at the date of the act, shall continue and be in force in the parts of the district ceded by those States respectively, the Court may lawfully issue writs of *mandamus*, even as original process, in all cases arising between individuals, both or either of whom are resident, or may be found within the district, in which, by the law of Virginia, or of Maryland, as the case may be, such writs could be issued. If this be so, as I am inclined to think it is, it is because this remedy existed as a part of the adopted local law which is declared to remain in force, and to which, for the purpose of this remedy, the jurisdiction of the Circuit Court is attached. But it is impossible to acquire any such jurisdiction, in this way, over the officers of the United States in their official capacities, because, in those capacities, they were never subject to the laws of Virginia or Maryland; nor did those laws ever include, nor could they confer any jurisdiction over them, by *mandamus* or otherwise.

Officers of the United States cannot sue in their names of office, except when expressly authorized so to do, by act of Congress; and the like legislative provision is necessary to render them liable, in their official capacities, to the process of the courts. No such provision is found in the act concerning the District of Columbia.

It is also worthy of remark, that, notwithstanding the strong opinion of Chief Justice Marshall, in the case of *Marbury v. Madison*, in favor of the right of the applicant to a remedy by *mandamus*, in any court possessing jurisdiction, no proceeding in the Circuit Court of this district appears to have been instituted, or to have been thought of, by the parties, or their counsel; although the Court then possessed precisely the same power, in this respect, which it possesses now, and though all the parties were residents of the district. This omission, under all the circumstances, proves, very clearly, that the jurisdiction, now claimed, was not then supposed to exist. Instances have, no doubt, frequently occurred, since that period, in which individuals have felt themselves aggrieved by the action of the executive officers, in cases affecting the rights of such individuals, but this appears to be the first application ever made to the Circuit Court of this district, for a remedy by *mandamus*.

After the most careful examination of the various provisions of the Act of 1801, "concerning the District of Columbia," I find

nothing in those provisions to authorize the application of such a remedy.

3. In a subsequent part of the opinion, the claim of jurisdiction is defended on another ground.

"Our powers," say the Court, "are given by the third, and our jurisdiction by the fifth, of the Act of the 27th of February, 1801," [2 Stat. at Large, 103.] And after quoting the third section, (copied above,) the opinion suggests that the only circuit courts and judges of the circuit courts, existing when the Act of the 27th of February, 1801, was passed, were those ordained and established by the Act of Congress of the 13th of February, 1801, [2 Stat. at Large, 89]; that the tenth and eleventh sections of that act were far more comprehensive than the Act of 1789, organizing the former circuit courts, and covered the whole ground of the Constitution; and that if they had been in full force when the case of *McIntyre v. Wood* arose, the decision in that case would probably have been different; and the proposition is advanced, that "although the Act of February 13, 1801, was repealed by the Act of 1802, yet the repeal did not in any manner affect the powers or jurisdiction of this Court given by the Act of 27th of February, 1801."

From the subordinate place assigned to this argument, it does not seem to be much relied on by the Court; and, in my judgment, it is wholly untenable. It is true that the Act of the 27th of February, 1801, was passed fourteen days after the enactment of the law changing the judiciary system, and establishing the new circuit courts of the United States, and that it gave a more extensive jurisdiction than the eleventh section of the Act of 1789; but it is scarcely correct to speak of those courts as in existence on the 27th of February, 1801. The law creating them was passed on the 13th of February, and the nominations were made and acted on between that day and the 3d of March, 1801; but no one of the courts was organized, and probably no one of the judges actually in office on the 27th of February. This, however, is not very important, because the third section of the Act of the 27th of February, 1801, concerning the District of Columbia, contains no specific reference to the Act of 13th of February; but merely says, "that the said Court, and the judges thereof, shall have all the powers vested in the circuit courts, and the judges of the circuit courts of the United States."

The object of this section evidently was, to define the general powers of the Court, and not to enter into the details rendered necessary by the peculiar condition of the district, which was done in the fifth section. Its general powers, and the general powers of its judges, were to be the same with those of the circuit courts,

and the judges of the circuit courts of the United States, not as defined in any particular law, but as they should from time to time be vested by law in those courts and judges. This, it seems to me, is the plain meaning of the clause. Consequently, although so long as the Act of 1801 remained in force, its provisions formed the measure of the general powers of the Circuit Court of this district; yet, when it was repealed, and the old provisions of the Act of 1789 substituted in its place, those substituted provisions became, thenceforward, the measure of its general powers. This is the general rule of interpretation in such cases, because it is not to be presumed, unless the contrary be expressly declared, that the repealed law shall remain in force in respect to any one of several cases standing on the same ground, and thus produce an unnecessary and anomalous distinction.

This rule is especially applicable to the present case. The Act of the 8th of March, 1802, repeals the Acts of the 13th of February and the 3d of March, 1801, from and after the first day of July, then next, and contains no exception whatever of the court established in this district. The third section expressly declares, "that all the acts, and parts of acts, which were in force before the passage of the aforesaid two acts, and which by the same were either amended, explained, altered, or repealed, shall be, and hereby are, after the said first day of July next, revived, and in as full and complete force and operation, as if the said two acts had never been made."

Under these circumstances, it seems to me impossible to derive any power from the Act of the 13th of February, 1801; and I shall, therefore, omit any reference to the particular provisions of that law.

4. I do this, the rather, because, in my judgment, neither the provisions of that law, supposing them to be in force, nor those of any other law that has been, or can be, passed, under our present Constitution, however broad they may be in their terms, can confer on any court of the United States the power to supervise or control the action of an executive officer of the United States, in any official matter properly appertaining to the executive department in which he is employed.

In my former communication I did not deem it needful to enter into the exposition of this part of the case. The two decisions of the Supreme Court, to which I referred, seemed sufficient for my purpose; and for obvious reasons connected with the history of the case of *Marbury v. Madison*, I purposely refrained from any allusion to that case. The claim of jurisdiction now made by the Circuit Court, and the course of reasoning by which it is supported, involving, as they do, an assertion of power to direct, not

only the Postmaster-General, but every other executive officer residing within the district, in the performance of his official duties when they are supposed to affect the legal rights of an individual, compel me to explain the constitutional grounds on which this part of my opinion is founded.

The proceedings of the convention which framed the Constitution, abundantly prove the earnest desire of its authors to separate the three great departments, the legislative, executive, and judicial, from each other, and to render each independent of the other two. This general object was accomplished, with a few specified exceptions, by the actual provisions of the Constitution. It declares that "the executive power shall be vested in a President of the United States." In accordance with this fundamental arrangement, it subsequently provides that the President "shall take care that the laws be faithfully executed." As a means to the performance of this duty, it gives to the President the exclusive power of appointing, by and with the advice of the Senate, the principal officers in the executive departments; it authorizes him to require from them their opinions in writing "upon any subject relating to the duties of their respective offices." It secures the appointment of inferior executive officers to the President alone, or to the heads of departments, as Congress shall, by law, direct; and according to a construction, coeval with the existence of the government, settled on the fullest deliberation, it also secures to the President the power of removing, at pleasure, either by his own act, or through the agency of the heads of the departments, every officer employed therein.

The obvious design of all these provisions, was, to make the President responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department. Not that he should be liable to impeachment, or other criminal procedure, or to a civil action for every illegal act, or culpable omission of each one of those officers. Their great number, the distance of many of them from the seat of government, and the multifarious character of their duties, render it impossible for any one man to give such attention to their conduct, as to become responsible for them in that sense; and the law, whether prescribed by a constitution, or otherwise, never requires impossibilities; nor that the inferior officer should be exempt from personal responsibility by impeachment, indictment, or civil action, for any culpable act, or omission of duty, even though he may be able to plead, in his excuse, the express direction of the President. But it is possible for the President, through the heads of departments, to give more or less attention to the proceedings of each department, and to take care that the laws concerning it be faithfully

executed ; and it is agreeable to reason and the rules of law, that where two persons are united in the performance of an illegal act, or in a culpable omission of duty, each, to a greater or less extent, and according to the circumstances of the case, should be personally responsible, although one of them may have an official superiority to the other. This species of responsibility, it was the design of the Constitution to fasten upon the President ; and hence it vests in him, and in him alone, with a few specified exceptions, the whole executive power of the government. It is true that, within a few years, the doctrine has been advanced, that when the Constitution says "the executive power shall be vested in a President of the United States," it merely intends to give a name to the department, and not to grant any executive power ; and that, on this ground, efforts have been made to prove that the President alone does not possess the power of removal ; but it is also true that this doctrine is directly opposed to the natural import of the language used ; to the principles on which the power of removal was established by the first Congress ; to the expositions, then and since, given by the ablest expounders of the Constitution ; and to the actual course of the government, acquiesced in by all its branches during the whole period of its existence.

The system thus ordained by the Constitution, whatever diversity of opinion may have existed, or may yet exist, as to its expediency, cannot be varied or interfered with by the legislature or the judiciary. It belongs to the legislature to create the executive departments, to define their powers and duties, to provide the requisite officers, to prescribe their various functions, and to make all other legal provisions which may be necessary and proper to regulate the action of those departments. But when a law is once passed for the government of the executive officer, all that appertains to its execution falls under the care of the President. It is his province to instruct and command the officer ; to remove him if he acts unfaithfully ; and to appoint one in his place who will fulfil his duty agreeably to law. No other department of the government can exercise this power of removal ; the legislature cannot do it themselves ; nor can they devolve it on the judiciary ; nor can those two departments combined take it from the President.

It results from the foregoing principles, that the writ of *mandamus* cannot be issued by any court of the United States, to any officer, whether principal or inferior, of an executive department, for the purpose of commanding the execution of any law concerning the appropriate executive duties of such officer.

This conclusion will be strengthened by a little attention to the history and nature of the writ.

From an early period it has been used by the English Court of King's Bench as a means of enforcing its general supervisory jurisdiction over courts, magistrates, and ministerial officers inferior to that tribunal.

By the statute of 9 Anne, c. 20, and 11 Geo. 1, c. 4, it was so extended as to afford a remedy for persons entitled to offices, or places, in corporations; and to compel elections, and correct abuses therein, of corporate officers; but we find no instance of its being directed to any officer of the executive departments. In England, it issues from the King's Bench alone, because, in that court, the king originally sat in person, and, by fiction of law, is yet supposed to do so; and because the authority to control the inferior jurisdictions is one of the royal prerogatives. It is, therefore, denominated by Blackstone and other writers, "a high prerogative writ." And if the judge or officer to whom it shall be directed, in its peremptory form, fails to obey it, he is punishable for his contempt by attachment. During the colonial government, this branch of the king's prerogative extended to the colonies, and was executed through those colonial courts which were invested with a jurisdiction analogous to that of the King's Bench; and from them the jurisdiction has been derived to the State courts which succeeded them. Under the fourteenth section of the Act of 1789, the Supreme Court, in aid of its appellate jurisdiction, may issue this writ in all cases where any act, necessary to the exercise of that jurisdiction, shall be omitted to be performed by an inferior tribunal or officer; and the Circuit Courts of the United States may also issue it in like cases. In these instances the original design of the writ is plainly kept up; the tribunals or officers to which it is issued, are subordinate to the appellate court, which, in these respects, exercises over them a supervisory jurisdiction.

The writ, then, necessarily implies a supervisory power, in the court which issues it, over the tribunal or officer to which it is directed. In the cases mentioned, such a power exists; but under the Constitution of the United States, it has not been given to, and cannot exist in, any of our courts over the executive departments.

The existence of such a power in the judiciary, is repugnant to the whole theory of the Constitution; its effectual exertion, if it were practicable, would defeat the President's power of removal; would take away his responsibility for the faithful execution of the laws; and would transfer to the judiciary, in the particular case, the whole executive power; for it is palpable, that if the President, under the belief that the faithful execution of the law will be best secured by not doing a particular thing which is

demanding by a third party, so directs the executive officer, and the Court, on the application of such party, issues a *mandamus*, commanding it to be done, and the writ is obeyed, it is the Court, and not the President, that exercises the executive power; and the distribution of powers, so carefully fixed by the Constitution, is unsettled and overturned. But its effectual exertion is not practicable; because the President's power of removal cannot be restrained, and by its exercise he can readily defeat any command which the judiciary may address to the executive officer.

To illustrate this, let us suppose that the Circuit Court of this district issues a peremptory *mandamus* to the head of any one of the departments, commanding him to execute any particular law concerning his official duties, in a given way, and that the officer refuses obedience, and is attached and committed for the contempt. This is the end of the judicial power in a case of *mandamus*; but suppose, at this stage of the proceedings, the President interferes, by removing the officer, and appointing a successor, what then becomes of the judicial remedy? The act can only be performed by a person holding the office; the individual, in the custody of the Court, no longer holds that office; it has been legally taken from him; and if he were ever so willing to perform the act, he has no longer the ability to do so. The proceeding must then be abandoned, or commenced *de novo*, against the new officer, to be frustrated, if the President thinks proper, at the same stage, as often as the Court shall reach it. If it be said that this is supposing an extreme case, and that the President, from respect to the judiciary, would probably suffer the officer to obey the *mandamus*, rather than so exercise the constitutional power of removal, the answer is, that the very existence of such a power, whether it be used or not, is fatal to the claim of jurisdiction; and that cases may easily be supposed, in which the President, with the strongest desire to avoid a conflict with the judiciary, may yet have no alternative but to use it.

In cases which properly refer themselves to the judiciary, it is rarely, or never, possible to defeat, in this way, the ultimate execution of the judgment of the Court. And the fact, that without the consent of the executive department, a peremptory *mandamus* to an executive officer must forever remain inoperative, exhibits, in the clearest light, the incapacity of any court to issue such a writ.

I am aware that those parts of the opinion of Chief Justice Marshall, in the case of *Marbury v. Madison*, which are quoted at length in the opinion of Judge Cranch, may seem to be repugnant to the conclusion at which I have arrived.

In that case, (1 Cranch, 137,) applications were made, in

December, 1801, by Messrs. Marbury and three other persons, to the Supreme Court of the United States, for a rule, to Mr. Madison, then Secretary of State of the United States, to show cause why a *mandamus* should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the District of Columbia. The application was founded on the following facts. Mr. Adams, whilst President of the United States, and on the 2d of March, 1801, had nominated the applicants to the Senate, for the offices of justices of the peace in the District of Columbia; their nominations were confirmed the next day, and the commissions were made out, signed by President Adams, sealed, and left in the Department of State. Mr. Jefferson came into office, as President, the next day, and forbade their delivery, and they were accordingly withheld by Mr. Madison. On the return of the rule to show cause, the counsel for the relators was heard *ex parte*, Mr. Madison not appearing. The case was disposed of, and the application denied, on the ground that the Supreme Court of the United States had no authority to issue a writ of *mandamus*, except in the exercise of its appellate jurisdiction; and that so much of the 13th section of the Judiciary Act of 1789, as purported to empower that court to issue writs of *mandamus* "to persons holding office under the authority of the United States," in original cases, was unconstitutional and void.

The order of discussion, adopted by the Chief Justice, was as follows:

- 1st. Has the applicant a right to the commission he demands?
- 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- 3d. If they afford him a remedy, is it a *mandamus* issuing from this Court?

These questions opened all the points in the case; and they are accordingly considered at large; but it is obvious that only the remarks under the third head were necessary to the decision of the cause; and that the elaborate reasoning under the first and second heads, including all the passages quoted in the opinion referred to me, was wholly extra-judicial. Every topic embraced under these heads is therefore open to discussion, not only in the Supreme Court, but in the inferior courts. The fact that the case was argued only on one side, must also be allowed to diminish still more the weight of these parts of the opinion; and then, also, it must be borne in mind that general expressions are always to be taken in connection with the particular case in which those expressions are used. Chief Justice Marshall himself has claimed the benefit of this latter rule in reference even to

that part of the opinion in *Marbury v. Madison*, which explained, under the third head, the very ground on which the cause was decided.

In the case of *Cohens v. The State of Virginia*, (6 Wheat. 264,) the counsel for the defendant in error quoted and relied upon some *dicta* of the court, in the case of *Marbury v. Madison*. In reply to the argument founded thereon, the Chief Justice observes :

“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing, on all other cases, is seldom completely investigated.”

“In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the Constitution had not clearly given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court, in support of this decision, some expressions are used which go far beyond it.” He then explains the particular occasion of the *dicta* relied on, and the cases to which they were intended to apply, and proceeds as follows :

“Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle.”

He then states the construction given to the passages quoted, and the argument founded on it, and observes,

“To this construction the court cannot give assent. The general expressions, in the case of *Marbury v. Madison*, must be understood with the limitations which are given to them in this opinion, limitations which in no degree affect the decision in that case, or the tenor of its reasoning.”

If the general expressions, contained in the essential parts of the opinion, require to be thus limited, the like caution must be still more necessary, in considering the other parts. On perusing

them with care, it will be found that before entering on the discussion of the remedy by *mandamus*, the Chief Justice had decided that the appointments in question became complete by the signing and sealing the commission ; that the applicant had, therefore, a vested legal right to the office, and to the commission as the evidence of it, of which the executive could not deprive him ; that the Secretary of State had received the commission from the President for the use of the applicant ; and that he had no more right to withhold it than any other person.

His reasoning in support of the remedy by *mandamus* depends entirely on the conclusion, previously expressed, that the appointment was complete, and the agency of the President and Secretary of State in the matter at an end ; and it was precisely on this point that President Jefferson dissented, in such strong terms, from the opinion of the Chief Justice.

Speaking of this case, in a letter to Judge Johnson, (Jefferson's Correspondence, vol. 4, p. 372,) he says,

"The commissions were signed and sealed by him (Mr. Adams) but not delivered. I found them on the table of the Department of State, on my entrance into office, and forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a *mandamus* to the Secretary of State (Mr. Madison) to deliver the commission intended for him. The court determined, at once, that, being an original process, they had no cognizance of it, and there the question before them was ended.

"But the Chief Justice proceeded to lay down what the law would be, had they jurisdiction of the case, namely, that they should command the delivery. The object was, clearly, to instruct any other court having the jurisdiction what they should do if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could any thing exceed the perversion of law ? For if there is any principle of law never yet contradicted, it is, that delivery is one of the essentials to the validity of a deed. Although signed and sealed, as long as it remains in the hands of the party himself it is *in fieri* only ; it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an *escrow*. But, whatever is in the executive offices is certainly deemed to be in the hands of the President ; and, in this case, was actually in my hands, because, when I countermanded them, there was, as yet, no Secretary of State."

The tone and language of this passage may be regretted ; but it shows very plainly, when taken in connection with the opinion, the real point on which the controversy turned.

In this view of the case, it is manifest that the question now presented, namely, whether a *mandamus* can be issued to the head

of an executive department commanding him to perform an executive act which has not yet been commenced, did not arise. The difference between this question, and the question, whether Congress can authorize the judiciary to issue a *mandamus* to an executive officer, to compel the delivery of a paper, in his possession, containing the evidence of a past executive act already fully performed, is too obvious to need remark.

The limitations to which the *obiter* arguments, in the case of *Marbury v. Madison*, are thus necessarily subject, rescue the present case from their influence, and supersede the necessity of a particular examination of any part of them.

There are, however, one or two remarks on the argument of Chief Justice Marshall, which, as they may tend to elucidate the subject, and to prevent misapprehension, ought not to be omitted. He labors to prove that where a vested legal right has been violated by a public officer, or where a specific duty, on the performance of which individual rights depend, is assigned by law to an officer, and he refuses to perform it, the individual, who considers himself aggrieved, has a right to resort to the laws of his country for a remedy; and that the conduct of the officer is liable to be judicially examined.

This, if ever doubtful, is now too well settled to be disputed. Actions for trespass, and other actions for damages, against collectors of the customs, officers of the army and navy, and other public functionaries, for official acts or omissions, injurious to the vested rights of individuals, are of frequent occurrence; and it is not to be doubted, that through such actions, any officer of the government, the President included, may be held responsible in damages for the violation of any vested legal right. But these actions are against the officer in his individual character, and do not imply any power, in the judicial tribunals in which they may be prosecuted, to supervise, and control in advance, the official action of the officer. Such a power, however, is implied in the jurisdiction by *mandamus*; and its compatibility with the Constitution, when issued to an executive officer for the purpose of compelling him to perform a specific executive duty, is a point not discussed, nor even touched, in the opinion; probably because it was supposed that, if the appointment were regarded as complete, the point could not arise.

This subject was much considered, in the year 1808, by one of my predecessors in office. In that year an application was made, by Messrs. Gilchrist and others, to the Circuit Court of the United States for the District of South Carolina, for a rule on the collector of the port of Charleston, to show cause why a *mandamus* should not issue to him, commanding him to grant clearances for

certain ships, detained by the collector, under instructions from the Secretary of the Treasury, given under the Embargo Acts.

The collector appeared; showed cause by producing the Secretary's instructions, and submitted without argument to the decision of the court. The judges, being of opinion that the instructions were illegal, ordered a *mandamus* to be issued commanding the collector to grant the clearances applied for. President Jefferson, on hearing of these proceedings, referred the subject to the Attorney-General, Mr. Rodney, who expressed a decided opinion against the power of the court to issue the writ. After stating several reasons, growing out of the limited jurisdiction of the courts of the United States, and the peculiar provisions of the law under which the instructions of the Secretary of the Treasury had been issued, he concludes as follows:—

“It might, perhaps, with propriety, be added, that there does not appear, in the Constitution of the United States, any thing which favors an indefinite extension of the jurisdiction of courts over the ministerial officers within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the others.

“The courts are, indubitably, the source of legal redress for wrongs committed by ministerial officers, none of whom are above the law. The redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and obvious distinction between a course of proceeding which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the President, and prescribing the course which he and the agents of any department must pursue. In one case, the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other, all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind, if made applicable to officers, indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers, vested in one department, to another department. If, in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the Constitution, perhaps defeated, which makes it the duty of the President to take care that the laws be faithfully executed.

“I do not see any clear limitation to this doctrine, which would

prevent the courts from compelling, by *mandamus*, all the executive officers, all subordinate to the President, at least, whether charged with legal duties in the Treasury, or other department, to execute the same according to the opinion of the judiciary, and contrary to that of the executive. And it is evident that the confusion arising, will be greatly increased by the exercise of such a power by a number of separate courts of legal jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the Supreme Court. So many branches of the judiciary acting within their respective districts, their courses might be different, and different rules of action might be prescribed for the citizens of different States, instead of that unity of administration which the Constitution meant to secure, by placing the executive power, for them all, in the same head.

“What, too, becomes of the responsibility of the executive to the court of impeachment and of the nation? Is he to remain responsible for acts done by command of another department? Or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred that the Constitution of the United States by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principle of the English law which would authorize either to enter into the department of the other, to annul the powers of the other, and to assume the direction of its operations to itself.”

This opinion may be found, at length, in Hall's American Law Journal, (vol. 1, p. 433,) and at page 440 of the same volume, will be found a reply from Judge Johnson, who presided in the Circuit Court when the *mandamus* was issued. This paper embraces a full review of most of the objections of the Attorney-General, but by no means answers the argument just quoted. The submission, of the collector and District-Attorney, is relied on as, at least, excusing the act of the court; and in the case of *McIntyre v. Wood*, (7 Cranch, 504,) it is expressly admitted, by Judge Johnson himself, that the court had no jurisdiction in the matter, except that derived from the consent of the public officers.

This is his language: “A case occurred, some years since, in the Circuit Court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a *mandamus* to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector, and the District-

Attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*"

As the Charleston case is the only one, prior to the present, in which a writ of *mandamus* has been actually issued, by any of the courts of the United States to an executive officer, its history and result are interesting; and I am happy to find in them so decisive a corroboration of my own opinion.

5. But the ground is taken, in the opinion of the Circuit Court, that the relation of the Postmaster-General to the President, is very different from that of the other heads of departments.

"They," (say the Court,) "in the very terms by which their offices are created and their duties defined, are to perform such duties, and execute such orders as they shall be required, to perform and execute, by the President of the United States. The Postmaster-General, however, clearly bears no such relation to the President. We cannot find a word in the law under which he was appointed, or in the various laws respecting the post-office establishment, or in the Constitution of the United States, which intimates any connection between him and the President; or any authority in the President to prescribe his duties, or to control him in the exercise of his official functions. It is true that he is appointed, and therefore may be removed by the President. But the President, if he has the power to control him, can only do it through his fear of removal. If he should not control him, no act done by him, under that control, could be thereby justified. The Postmaster-General, in the exercise of the duties of his office, appears to be legally as independent of the President, as the President is of him."

It was with great surprise that I perused this part of the opinion. The Constitution assumes that certain executive departments will be created, but does not attempt to enumerate them; nor was any enumeration necessary; because the very nature of the functions assigned to any particular department, would readily determine its true character.

The whole business of the Post-Office Department, and all the official duties of the Postmaster-General as its head, are, exclusively, executive; and if the views of the Constitution, above taken, be correct, then, whatever may be the language of the acts of Congress respecting the department, there exists a most intimate connection between the Postmaster-General and the President; and the latter has the same control over the exercise of his official functions, when not prescribed by law, and is subject to the same obligation of taking care that all his duties are faithfully performed, which exist in respect to the other heads of departments.

The passage above quoted, is not less repugnant to the practical course of the government.

One of the first official acts of President Washington, after entering on the chief magistracy, was to call on the then Postmaster-General for an account of the state of his office.

"A perfect knowledge" (says his biographer) "of the antecedent state of things, being essential to the due administration of the executive department, its attainment engaged the immediate attention of the President; and he required the temporary heads of departments to prepare, and lay before him, such statements and documents as would give this information." Marshall's *Life of Washington*, vol. 2, p. 150.

The form of this requisition will be found in the late collection of his Writings, (vol. 10, p. 11,) and it will be seen, by the note of the editor, Mr. Sparks, that it was addressed, among others, to Ebenezer Hazard, the Postmaster-General appointed by the old Congress.

The first law concerning the Post-Office Department, passed after the adoption of the Constitution, was the act "for the temporary establishment of the post-office," approved September 22, 1789. It consisted of only two sections; the last merely declaring that the law should continue in force until the end of the next session of Congress, and no longer. The first section was in the following words:

"Be it enacted," &c., "that there shall be appointed a Postmaster-General; his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the post-office, shall be the same as they last were under the resolutions and ordinances of the late Congress. The Postmaster-General to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail."

This act was continued in force by the Acts of August 4th, 1790; March 3d, 1791, and February 20th, 1792, to the 1st of June, 1792, when it gave place to the Act of the 20th of February, 1792, "to establish the post-office and post-roads within the United States," which fully organized the department, and introduced numerous legal provisions for the government of its concerns.

Since 1792 the duties of the Postmaster-General have been so far defined by law, as to leave little room for executive direction, and it was not until 1829, that he was regarded as a member of the President's cabinet. But that his office has always been treated by Congress, as well as by the President, as an executive department, is shown by the Act of 1789, which left all its con-

cerns to the direction of the President; by the Act of 1792, and all the subsequent laws, which speak of it as a "department;" by the power, of appointing postmasters, vested, by law, from 1789 to 1836, in the Postmaster-General alone, and still retained by him in all cases where the commissions of the postmaster are under \$1,000. An arrangement palpably unconstitutional, unless the Postmaster-General be the head of a department; by the practice, of all those who have held the office of President, to require reports from, and to give directions to, the Postmaster-General; by the placing of the department on the same footing, in respect to salary and organization, with the other great executive departments; and finally by the introduction of its head into the cabinet council of the President.

The relation, then, of the Postmaster-General, to the President, is the same as that of the other heads of departments. This relation does not authorize the President to give any direction, to the Postmaster-General, contrary to the laws concerning the department, but it authorizes and requires him to direct the faithful execution of those laws, and to take care that such directions be followed. And as the only coercive power, with which the President is armed by the Constitution, is the power of removal, it will be his duty to exercise that power, if he cannot otherwise secure, on the part of the Postmaster-General, a faithful execution of the laws. Nor will acts done by the Postmaster-General, under the President's direction, be invalid, even though the judgment of the former be opposed to the act, and he be induced, through fear of removal, to execute the President's direction. The defectiveness of the motive will not determine the legal character of the act. If it be within the power of the department, and be conformable to law, it will still be valid. I think, therefore, that this officer is no more subject, in his official action, to the supervision and control of the judiciary, than the head of any other executive department; and that the principles above stated, if sound in respect to any executive officer, must be admitted, when the subject shall be fully examined, to be equally applicable to him. On the other hand, the claim of judicial power set up in the present case, in respect to the Postmaster-General, involves the like claim over the official action of every other executive department, and therefore brings into discussion one of the most grave and important questions which has yet arisen in the practical administration of the government.

I am, Sir, very respectfully, your obedient servant,

B. F. BUTLER.

This communication from the Postmaster-General, having been offered to the Court as his return to the writ of *mandamus nisi*,

Mr. Coxe, for the relators, moved the Court to quash the return and to issue a peremptory writ of *mandamus*.

The case was ably argued, on the 26th, 27th, 28th, 29th, and 30th of June, by *Mr. R. S. Coxe* and *Mr. Reverdy Johnson*, for the relators, and by *Mr. Key* for the Postmaster-General.

On the 13th of July, CRANCH, C. J., delivered the unanimous opinion of the Court, as follows :

In his return of the *mandamus nisi*, the Postmaster-General, by way of showing cause why he declines obedience to the command of the writ, contends,

1. That "it is doubted whether the Constitution of the United States confers, on the judiciary department of the government, authority to control the executive in the exercise of its functions, of whatsoever character."

2. That "if, according to the Constitution, the Circuit Court of the District of Columbia might be clothed by law, with the power to issue a *mandamus* in such a case, no such power has been conferred upon them by the Acts of Congress."

3. That "if, by the Constitution, Congress can clothe courts with authority to issue writs of *mandamus* to executive officers, as such, and if they have vested the general power in this Court, by law, this is not a case, in which that power can be lawfully exercised;" and,

4. That "the Court have ordered the Postmaster-General to perform a legal impossibility."

The counsel for the relators have moved to quash this return, as being insufficient on its face, and the questions arising upon that motion have been fully, and very ably argued.

Although the order, in which the questions are presented in the return, is perhaps the most natural, yet, inasmuch as a decision, against the relators, upon the 4th, 3d, or 2d, of the objections stated by the Postmaster-General, would render it unnecessary to give any opinion upon the first, the Court, in considering the case will reverse that order, as suggested by the District Attorney, and commence with the fourth, which is

"That the Court have ordered the Postmaster-General to perform a legal impossibility."

The argument, in support of the proposition, is this: "A *mandamus* is a command to do a specific act. The specific act, ordered to be done, in this case, is, to credit the relators with the full amount of the Solicitor's award. A credit can only be given by an entry in some book in which their accounts are lawfully kept. No accounts are kept, with contractors, in the Post-Office Department; nor has the Postmaster-General the custody or control of the books in which they are kept. All the accounts of the

Post-office Department are kept in the Treasury Department by the auditor created for that purpose by the Act of July 2d, 1836. That officer is appointed by the President and Senate ; and so far is he from being dependent on the Postmaster-General that his clerks are appointed by the Secretary of the Treasury. To his office have been transferred, long since, all the accounts, and the books, connected with them, formerly kept by the Postmaster-General.

“By adverting to the fact, that the act for the relief of Messrs. Stockton and Stokes, and that to change the organization of the Post-Office Department, passed on the same day, the occasion of this practical discrepancy between them, will be understood. The former was drawn with reference to the organization of the department at the time of its introduction into Congress. Then, the Postmaster-General kept the accounts, and the entries in the books were his entries. He had the legal power and authority to give a credit to the contractors in this case. But this power and authority was taken from him by another act on the day the act for their relief passed. That the act, now in question, was not altered so as to accommodate it to the change, and requires the credit to be given by the new auditor, instead of the Postmaster-General, was doubtless an inadvertence ; but it is one which the legislative authority, alone, can correct.

“As the law stands, the Postmaster-General has just as much authority to make entries in the books of the Second, Third, and Fourth Auditors, as he has in those of the auditor created by the Act of 1836. Hence the Court will perceive that they have ordered the Postmaster-General to do that which he cannot lawfully do, — to enter a credit or credits on books of which he has neither the custody nor control.”

The words of the act for the relief of the relators, are, “and that the Postmaster-General be, and he is hereby directed to credit such mail contractors, with whatever sum or sums, if any, the said Solicitor shall so decide to be due to them, for, or on account of, any such service or contract.” The act does not require the Postmaster-General to enter the credit in any book, or in any account ; but that he shall credit them. The substance is, that he, as far as is in his power, shall cause them to have credit for that amount in their account with the United States, or with the department.

This objection is not stated by the Postmaster-General as a reason why he has not credited them with the amount, but as a reason why this Court should not command him to credit them. It is not objected that there is an actual impossibility of his crediting them, but “a legal impossibility ;” meaning, probably, that

his crediting them now would be of no avail in law, as the settlement of the account was transferred to the auditor.

That the change which was made in the Post-Office Department by the Act of the 2d of July, 1836, did not create an actual impossibility of his crediting them with the whole amount of the award, is evident from his own letter to the President of the United States, dated December 27, 1836, in answer to the complaint of the relators to the President, in which the Postmaster-General says,

"In obedience to the mandate of the law I have paid those gentlemen \$122,101.46, although I have yet to be convinced that they had the least claim, in law or equity, to one sixth part of that sum. When the law requires it of me, I shall, with equal promptitude, pay the remaining \$40,625.59, although satisfied that not one cent of it is justly due." He does not justify himself on account of his legal inability to pay, or to credit the amount.

But it has been stated, in the argument before the Court, that the Postmaster-General can lawfully pay the amount, although he cannot credit it. The law, which allows him to pay the amount, surely should be construed to allow him to credit it, especially when the Act of Congress expressly directs him to credit it.

The act for the relief of these relators, and the act, "to change the organization of the Post-Office Department," were passed at the same session of Congress, and were approved on the same day. So far as they are in *pari materia*, they ought to be construed together, and made to harmonize with each other, if possible. The arrangement of the department, so far as it authorized an auditor to be appointed for the purpose of receiving, auditing, and settling "all accounts arising in the department, or relative thereto, must be considered as qualified by the express direction that the Postmaster-General should credit the contractors with the amount of the award; and as reserving to the Postmaster-General the power to do what the act expressly requires him to do. The auditor, also, is bound to take notice that by the act "for the relief," &c., the Postmaster-General is directed to credit the contractors with the amount of the award; and whenever the Postmaster-General, who still continues to be the head of the department, shall credit them with the amount or shall order it to be credited, the auditor will allow the same in auditing and settling their account.

Although the accounting bureau of the department has been removed to the Treasury Department, yet ample powers are given to the Postmaster-General; and by the ninth section of the Act of 2d July, 1836, "to change the organization of the Post-Office Department," it is made his duty "to control, according to law,

and subject to the settlement of the auditor," "the expenses incident to the service of the department;" and "to regulate and direct the payment" of the said "expenses for which appropriations have been made." Among "the expenses incident to the service," are included, no doubt, the expenses of the transportation of the mail, and the amount due to the contractors therefor. These duties imply powers which authorize the Postmaster-General to give this credit, or to direct it to be given; and the fact, that the auditor has, upon the authority of such a direction, allowed that part of the award which the Postmaster-General has deemed proper to credit, shows that, upon a like authority, he would allow the balance.

We therefore think that there is neither a legal, a moral, nor a physical impossibility, on the part of the Postmaster-General, to obey the mandate by executing the law.

We must, therefore, next consider the third reason assigned by the Postmaster-General for not obeying the command of the writ; which is,

3. That "if, by the Constitution, Congress can clothe the courts with authority to issue writs of *mandamus* to executive officers, as such, and if they have vested the general power in this Court, by law, this is not a case in which that power can be exercised."

The argument, in support of this proposition, is, in substance,

1. That the Postmaster-General has a discretion, because the act, for the relief of these relators, does not require him to pay any specific sum; but a sum to be ascertained by comparing the award of the Solicitor with the act.

That the act does not require the Postmaster-General to credit all the Solicitor might award to them, but only so much as he might decide to be due, for and on account of such service or contract, as is described in the preceding part of the act; and the Postmaster-General has a discretion to pay or not, according as the allowance shall or shall not correspond with the act. That he is also to look into the award to see that it contains none of the prohibited items; and that he has a discretion to refuse to pay the whole award, or any part of it, if he honestly believes it to be contrary to law.

2. That a *mandamus* can be issued by a court, only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction. That this Court has no jurisdiction in this case, but what is given by the *mandamus*.

1. As to the first branch of this argument, we apprehend that the discretion which will justify a party in refusing to do an act, must be a legal right to do or not to do it according to his will.

The obligation of the Postmaster-General, under the act, is

absolute to credit whatever sum the Solicitor should decide to be due for and on account of the service and contract described in the act. The only fact to be decided, out of the act, is the amount which should thus be decided to be due. The award, upon that point, is clear and explicit. The question whether the money claimed and awarded was due for and on account of such service and contract, was as much submitted to the judgment of the Solicitor, as the question of the amount due; as to both points, his award is final and conclusive upon all persons. In the language of the Postmaster-General, "Congress created a special tribunal for that purpose. They made the Solicitor of the Treasury a chancellor for the special object, and clothed him with power to take evidence and adjudicate upon the claims of the contractors. No other court on earth could have entertained this case; nor was any appeal from this special court provided for by the law which created it. Neither the Circuit Court of this district, nor the Supreme Court of the United States, nor any other judicial tribunal had power to bring up the case, from the Solicitor of the Treasury, either before or after his award, and revise his proceedings. No judge could take from or add to the amount of his award; nor has any judge the legal power to say whether that officer decided according to law or against law. The Solicitor's power, in this case, was equal to that conferred upon the Supreme Court of the United States, in cases subjected to its jurisdiction, and above that of the Circuit Court of the District of Columbia, from which there is an appeal;" and, we will add, that the act gives no appellate jurisdiction to the Postmaster-General. The award is as conclusive upon him as upon all the rest of the world.

The proviso in the act, that the Solicitor should not make any allowance for certain enumerated items, was merely directory to the Solicitor, and gave the Postmaster-General no discretion over the award, or over the duty of crediting the contractors with the amount. The Postmaster-General seems to admit that, if the law directed the payment of a certain sum, he would have had no discretion; but *id certum est quod certum reddi potest*. The award renders that certain which was uncertain when the law was passed; and the duty of crediting the amount of the award is now as absolute as if that amount had been ascertained and stated in the law itself. The discretion which is claimed by the Postmaster-General is no other than that discretion which every man has in regard to his own actions. Every man is a free agent. He has the power to do or not to do a particular act; and he decides upon his own responsibility. Neither his discretion nor his decision makes the act lawful or unlawful. Every

man must judge, for himself, of his own duty ; but he acts at his peril ; if correctly, he is justified ; if erroneously, he must abide the consequence.

We are of opinion, therefore, that the Postmaster-General had not such a discretion over the duty enjoined by the statute, as renders it improper that a *mandamus* should issue in this case.

But it is contended that "a *mandamus* can be issued by a court only as a means of exercising its jurisdiction, and not for the purpose of obtaining jurisdiction."

This proposition is admitted, by this Court, in its fullest extent ; and the only ground upon which the power of issuing that writ is claimed, is, that it is a writ necessary for the exercise of the jurisdiction of the Court, in a case of which it already has cognizance. That case is, that the Postmaster-General has refused to perform a duty positively required of him by an act of Congress, to the injury of the relators, who have brought their complaint before the Court, by affidavit and petition, praying the Court to grant them a proper remedy. A rule has been granted them upon the Postmaster-General to show cause why a *mandamus*, which is the only proper and adequate specific legal remedy, should not be issued, commanding him to perform what the statute directs him to do. The Postmaster-General has failed to appear upon the rule to show cause.

But it is denied that this is a case, because Mr. Justice Story, in his Commentaries on the Constitution of the United States, Vol. 3, p. 507, says, that "a case, then, in the sense of this clause of the Constitution, arises when some subject, touching the Constitution, laws, or treaties of the United States is submitted, to the courts, by some party who asserts his rights in the form prescribed by law."

In the present case, however, "a subject, touching the Constitution and laws of the United States, is submitted to" this "Court," by the relators, "who assert their rights in the form prescribed by law." They have done all they could to bring their case before the Court. If this is not sufficient to give the Court jurisdiction, it would never be in the power of the Court to exercise the potential jurisdiction which is given to it by the statute.

When we say, in common parlance, that the jurisdiction is given by a statute, we do not mean that the Court has, thereby, actual jurisdiction of any given case, but only that the Court shall exercise jurisdiction in such cases when they shall be brought judicially before it. When, therefore, the 14th section of the Judiciary Act of 1789 gives to the courts power to issue all writs which may be necessary for the exercise of their respective juris-

dictions, it is not intended that the Court shall have had actual jurisdiction of the particular case, by its having been actually submitted to the Court in the form prescribed by law, before it shall have power to issue the writ necessary for the exercise of its jurisdiction; for that writ may be the very form prescribed by law for submitting the case to the Court; and if the Court could not issue the writ until it had actual jurisdiction, and could not have actual jurisdiction until it had issued the writ, it is evident that the Court could never exercise the jurisdiction given to it by the statute. The jurisdiction, mentioned in the 14th section of the act, must, therefore, mean the potential jurisdiction; that is, the jurisdiction which the respective courts may exercise when the cases, described in the statutes giving the jurisdiction, shall arise and be submitted to the courts by means of the writs which, by the 14th section, they have power to issue.

This, therefore, is a case of which the Court, not only potentially, but actually, has jurisdiction by means of the petition, affidavit, and rule to show cause; and the writ of *mandamus* is a writ necessary for the exercise of its jurisdiction, in that case, if this Court can, by law, issue such a writ to an executive officer of the United States, commanding him to do a merely ministerial act which he is expressly required by an act of Congress to do; and therefore this Court has power to issue it.

We are then brought to the consideration of the second ground upon which the Postmaster-General alleges that this Court has no power to issue the writ, namely:

That "if, according to the Constitution, the Circuit Court of the District of Columbia might be clothed, by law, with the power to issue a *mandamus*, in such a case, no such power has been conferred upon them by the acts of Congress."

For the argument in support of this proposition, the Postmaster-General has referred the Court to the very able and elaborate opinion of the Attorney-General of the United States, which accompanies, and makes a part of, the return to the writ of *mandamus*; and of which the Postmaster-General has given the following epitome, or analysis: The undersigned is spared the labor of investigating and illustrating this position, by the clear, and, he thinks, conclusive, opinion of the Attorney-General, which he transmits herewith, and requests it may be considered part of this letter.

"That opinion reviews the opinion of the Circuit Court, as delivered by Chief Justice Cranch, and published in the National Intelligencer, and maintains the following positions:

"1. That the argument of the Court, in favor of the jurisdiction claimed by them, is founded on inferences from the language of

Judge Johnson, in the case of *McIntire v. Wood*, which inferences were repudiated by the same judge, and by the judgment of the Court in a subsequent case.

"2. That there is no substantial difference between the words of the Judiciary Act of 1789, [1 Stat. at Large, 73,] which the Supreme Court have twice decided do not give the other circuit courts power to issue a *mandamus* to an executive officer, and the words of the 5th section of the Act concerning the District of Columbia, on which the Circuit Court rely: and that the jurisdiction of the latter is, therefore, in this respect, no greater than that of the other courts.

"3. That no power is to be derived from the Act of the 13th of February, 1801, because that act was repealed in 1802, without any exception as to the Circuit Court of this district.

"4. That even, if the Acts of Congress, concerning this Court, had given to it, in express terms, a jurisdiction to issue writs of *mandamus* to an executive officer, to compel him to perform an official act, no such jurisdiction could be exercised consistently with the provisions of the Constitution, because such a jurisdiction would be, substantially, an exercise of executive power, which cannot be taken from the President, in whom the Constitution has vested it.

"5. That the Postmaster-General is an executive officer, and equally independent, with the other heads of the executive departments, of any control, in the exercise of his official duties, by the judiciary."

The Attorney-General, in reviewing the opinion of this Court, given upon the rule to show cause why a writ of *mandamus* should not issue, supposes that the Court relied much upon the inferences drawn from the language of Mr. Justice Johnson, in delivering the opinion of the Supreme Court of the United States, in the case of *McIntire v. Wood*, 7 Cranch, 504. That language is as follows: "We are of opinion that the power of the circuit courts to issue the writ of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the Judiciary Act (of 1789,) covered the whole ground of the Constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States; and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in

certain specified cases. When questions arise, under those laws, in the State courts, and the party, who claims a right or privilege under them, is unsuccessful, an appeal is given to the Supreme Court; and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause in the Constitution which relates to the subject."

This is the whole of the opinion upon that point. The case was a case arising under the laws of the United States, it being a motion or a petition for a *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the plaintiff for certain lands in that State.

The inference from the language of that opinion is irresistible, that if the legislature had extended the jurisdiction of the circuit courts of the United States to cases in law and equity arising under the laws of the United States, there might be cases in which it would be proper for those courts to issue the writ, and that the 14th section of the act, which gives to all the courts of the United States power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, would sanction the issuing of the writ.

But this inference is said to have been repudiated by Judge Johnson himself, in delivering the opinion of the Supreme Court in the subsequent case of *McClung v. Silliman*, in 6 Wheaton, 598.

The only substantial difference between the case of *McIntire v. Wood*, and the case of *McClung v. Silliman*, which was brought up from the Circuit Court of the United States for the District of Ohio, is, that in the former, the controversy was between citizens of the same State, and the only ground of federal jurisdiction was, that it was a case arising under the laws of the United States. And in the latter (*McClung v. Silliman*,) it was a case arising under the laws of the United States, "between a citizen of the State where the suit was brought, and a citizen of another State." This last circumstance would have given the Circuit Court of Ohio jurisdiction of the case, if it had been one, of which a State court might have had jurisdiction. But inasmuch as a State court had no jurisdiction of cases arising under the laws of the United States, and the 11th section of the Judiciary Act of 1789 only gave to the circuit courts a jurisdiction concurrent with the courts of the several States, the Circuit Court of the United States for Ohio, had not jurisdiction under the 11th section of the act, although the character of the parties would have given it jurisdiction, if, from the nature of the subject-matter of the controversy, it had been a case of which a State court could have had jurisdiction. The same objection, therefore, to

the jurisdiction of the Circuit Court of the United States for Ohio, existed in *McClung v. Silliman*, as in *McIntire v. Wood*, namely, that there was no existing act of Congress which delegated to the circuit courts of the United States cognizance of "cases arising under the laws of the United States."

The 11th section of the Act of 1789, gives jurisdiction only upon the ground of the character of the parties, not upon the ground of the subject-matter of the controversy; and was only intended to give to parties of a certain description a right to prosecute, in the federal courts, the same causes of action which they could prosecute in a State court. The words "concurrent with the courts of the several States," do not enlarge the jurisdiction of the State courts, but are restrictive of the general words "all suits of a civil nature at common law or in equity," which would, if not thus restrained, have comprehended "cases arising under the laws of the United States."

With this exposition and construction of the 11th section of the Act of 1789, there is no discrepancy between the opinions of the Supreme Court in those two cases; and the opinion in *McClung v. Silliman*, becomes perfectly intelligible.

Mr. Justice Johnson, in *McClung v. Silliman*, (6 Wheat. 599,) says: "In the case of *McIntire v. Wood*, decided in this court in 1813, the *mandamus*, contended for, was intended to perfect the same claim, and, in point of fact, the suit was between the same parties. The influence of that decision on these cases is resisted on the ground that it did not appear, in that case, that the controversy was between parties who, under the description of person, were entitled to maintain suits in the courts of the United States; whereas the averments, in the present case, show that the parties litigant are citizens of different States, and therefore competent parties in the Circuit Court. But we think it perfectly clear, from an examination of the decision alluded to, that it was wholly uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated, was, 'whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the plaintiff, for certain lands in that State.' 'Both the argument of counsel, and the opinion of the court, distinctly show that the power to issue a *mandamus*, in that case, was contended for as incident to the judicial powers of the United States; and the reply of the court is, that though, *argumenti gratià*, it be admitted that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature

has only made a partial delegation of the judicial powers to the circuit courts. That if the inference be admitted as far as the judicial power of the court actually extends,' (namely, as we understand it, if the controlling power over ministerial officers would exist as far as the judicial power is actually granted to the circuit courts,) 'still cases arising under the laws of the United States, are not, *per se*, among the cases comprised in the jurisdiction of the circuit courts, under the provisions of the 11th section (of the Act of 1789); jurisdiction being, in such cases, reserved to the Supreme Court, under the 25th section, by way of appeal from the decisions of the State courts.'

"There is, then," continues the judge, "no just inference to be drawn from the decision, in the case of *McIntire v. Wood*, in favor of a case in which the circuit courts are vested with jurisdiction under the eleventh section."

The word "then," in that sentence, means "therefore;" and "therefore" means for the reason aforesaid; and the reason aforesaid is, that the eleventh section did not give the circuit courts jurisdiction of "cases arising under the laws of the United States;" and the reason, why the eleventh section did not give that jurisdiction, is, that the jurisdiction, thereby given, is a jurisdiction "concurrent with the courts of the several States," and, consequently, could be exercised only in cases of which the courts of the several States previously had cognizance; that the courts of the several States had not, previously, cognizance of cases arising under the laws of the United States; and therefore jurisdiction of those cases is not given to the circuit courts, by that section.

The inference, therefore, "drawn from the decision, in the case of *McIntire v. Wood*," which is repudiated by Judge Johnson, is not the inference that if the legislature had extended the jurisdiction of the circuit courts of the United States to cases in law and equity arising under the laws of the United States, there might be cases in which it might be proper for those courts to issue the writ, and that the fourteenth section of the act would sanction the issuing of it; which is the inference which this Court drew, in giving its opinion upon the rule to show cause; and which, we are still of opinion, is a necessary inference from the language of Mr. Justice Johnson in that case, and which is in no manner impugned or repudiated by the same judge in the case of *McClung v. Silliman*.

Again, Mr. Justice Johnson, in the same case (p. 601,) says: "It is now contended that, as the parties to this controversy are competent to sue under the eleventh section, being citizens of different States, this is a case within the provisions of the four-

teenth section, and the Circuit Court was vested with power to issue this writ under the description of a "writ not provided for by statute," but "necessary for the exercise of its jurisdiction." The case, certainly, does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect."

The proposition, which is thus said to be true in the abstract, is this: that as the parties were competent to sue, under the eleventh section, being citizens of different States, the fourteenth section gave the Court power to issue the writ of *mandamus*, under the description of a "writ, not provided for by statute," but "necessary for the exercise of its jurisdiction."

Here it may be proper to observe, that although in this case of *McChung v. Silliman*, the parties were competent to sue in the Circuit Court, yet the court had not jurisdiction of the subject-matter, it being a case arising under the laws of the United States.

The judge proceeded to say: "It cannot be denied that the existence of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because the court possesses jurisdiction, but because it does not possess it." That is, as we understand it, the Court has no jurisdiction; and if it can have any, it must be by first obtaining, by means of a *mandamus*, the document which is the object of the *mandamus*, and which will enable the party to sue at law.

The judge proceeds: "It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act, by the register of the land-office, or the party cannot sue.

"The fourteenth section of the act under consideration could only have been intended to vest the power, now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out."

Here, again, the inference, from the language of the judge, is very strong, that in cases where the jurisdiction already exists, the fourteenth section was intended to vest the power of issuing the writ.

Again, in p. 604, the judge says: "It is not easy to conceive on what legal ground a State tribunal can, in any instance, exercise the power of issuing a *mandamus* to the register of a land-office. The United States have not thought proper to delegate that power to their own courts. But when, in the case of *Marbury v. Madison*, and that of *McIntire v. Wood*, this Court decided against the exercise of that power, the idea never presented itself to any one that it was not within the scope of the

judicial powers of the United States, although not vested by law in the courts of the general government."

If, then, the inference drawn by this Court from the decision and language of the Supreme Court in the case of *McIntire v. Wood*, is an obvious and necessary inference, and is not impugned nor repudiated in that of *McClung v. Silliman*, namely: that if the eleventh section had given to the circuit courts, cognizance of all cases in law and equity arising under the Constitution and laws of the United States, there would be much reason for exercising this power in many cases, and that the fourteenth section would sanction the issuing of it for such a purpose; and if we show that Congress has given to this Court cognizance of all cases in law and equity arising under the Constitution and laws of the United States, it will follow that there may be cases in which it may be proper for this Court to exercise the power; and that Congress, by the third section of the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] which gives to this Court the same powers which it had given to the other circuit courts by the fourteenth section of the Act of 1789, has given this Court the power to issue the writ; and the former opinion of the Court, so far as it rested upon the inference drawn from the decision and language of the Supreme Court in the case of *McIntire v. Wood*, is fully supported.

Under this head, it would, then, be only necessary to show that by the fifth section of the Act of the 27th of February, 1801, Congress has given to this Court cognizance of all cases in law and equity arising under the Constitution and laws of the United States.

That section, so far as it relates to this question, is in these words: "That the said court" (the Circuit Court of the District of Columbia) "shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident or shall be found within the said district."

These words are comprehensive enough to include "all cases in law or equity arising under the Constitution and laws of the United States."

In the case of *Cohens v. Virginia*, (6 Wheat. 379,) Chief Justice Marshall, in delivering the unanimous opinion of the Supreme Court of the United States upon the question of jurisdiction, says, "The jurisdiction of the court, then, being extended, by the letter of the Constitution, to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case, of this description, from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the Constitution; which spirit and true meaning must be so apparent as to overrule the words which its framers have employed."

But it is contended, in the opinion of the Attorney-General, which the Postmaster-General has made part of his return, that "there is no essential difference between the fifth section of the Act" (of the 27th of February, 1801,) "concerning the District of Columbia, and the eleventh section of the Judiciary Act of 1789, which prescribes the jurisdiction of the other courts."

"The material words," he says, "of the fifth section, omitting other classes of cases, are, that the Circuit Court of this district shall have cognizance of all cases in law and equity, between parties, both or either of which shall be resident, or shall be found, within the said district.

"Those of the eleventh section, omitting value and alternative cases, are, that the circuit courts of the United States shall have cognizance of all suits of a civil nature, at common law, or in equity, where the dispute is between a citizen of the State where the suit is brought, and a citizen of another State, —

"Except that, in the other circuit courts, it is requisite that one party should be a citizen of the State where the suit is brought, and the other party a citizen of another State; and that in this district it will be sufficient if either of the parties be resident, or be found here, there would seem to be no substantial difference between the two provisions. Indeed, unless the phrase, 'all cases in law and equity,' means something different from 'all suits of a civil nature at common law or in equity,' used in the other, it is certain that there can be no such difference, and, consequently, that the power and jurisdiction of the Circuit Court of this district, in regard to the writ of *mandamus*, so far as depends on the fifth section above quoted, are precisely the same with those of the other circuit courts."

But the Attorney-General, in attempting to reduce these two sections to an equation, by striking out from both sides the terms which he deemed equivalent, has overlooked entirely the words, "concurrent with the courts of the several States," in the eleventh section of the Act of 1789; which are the very words that constitute the essential difference between the extent of jurisdiction granted in the respective sections. If they had not been stricken out of the equation, that side of it which regards the eleventh section would have been stated thus: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity," where the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

The other side of the equation (that which regards the fifth section of the Act of the 27th of February, 1801, which gives jurisdiction to this Court,) would be, "The said court" (the Circuit

Court of the District of Columbia,) "shall have cognizance of all cases in law and equity between parties, both or either of which shall be resident, or be found, within said district."

Again; by striking out from both sides of the equation the personal attributes of the respective parties, and thus reducing it to its lowest and most simple terms, the equation will stand thus:—

By the eleventh section of the Act of 1789, "the circuit courts" of the United States "shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity."

By the fifth section of the Act of the 27th of February, 1801, "the said court" (the Circuit Court of the District of Columbia,) "shall have cognizance" "of all cases in law and equity."

Here it is evident that the jurisdiction given to the circuit courts of the United States, by the eleventh section of the Act of 1789, extends to those cases only of which the State courts then had cognizance. The State courts had then no cognizance of "cases arising under the Constitution, the laws of the United States, and treaties made under their authority," nor of "cases affecting ambassadors," &c.

The Supreme Court of the United States, in the case of *Martin v. Hunter*, (1 Wheat. pp. 334, 335,) say: "In the first place, as to cases arising under the Constitution, laws, and treaties of the United States:—

"Here the State courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist, in the State courts, previous to the adoption of the Constitution; and it could not afterwards be directly conferred upon them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States." And in page 337, they say: "It can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction."

It is true that in the State courts, in the exercise of their ordinary jurisdiction, questions, upon the construction of the Constitution, laws, and treaties of the United States, may incidentally arise, and must be decided by those courts; but it does not follow that therefore they have direct jurisdiction of cases in which the cause of action arises under, or for the violation of, a law of the United States.

In cases where they have jurisdiction of questions arising incidentally, in causes within their ordinary jurisdiction, provision is made for an appeal, or writ of error, to the Supreme Court of the

United States, under the twenty-fifth section of the Judiciary Act of 1789.

Thus, the Supreme Court, in the same case of *Martin v. Hunter*, (p. 340,) say : " But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States, not only might, but would, arise in the State courts, in the exercise of their ordinary jurisdiction."

And again in page 342, they say : " It was foreseen that in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet, to all these cases, the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which, (as has been already shown,) may occur ; it must therefore extend by appellate jurisdiction or not at all."

But in the same case, (in p. 372,) Mr. Justice Johnson says, " That the real doubt is whether the State tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends."

However that may be, we think it clear that the concurrent jurisdiction of the State courts, referred to in the eleventh section of the Act of 1789, is the ordinary and direct jurisdiction which those courts possessed at the time of passing that act ; and that the grant of jurisdiction, by that section, to the circuit courts, is to be measured by the ordinary and direct jurisdiction which the State courts then possessed. That as the ordinary and direct jurisdiction of the State courts did not then extend to cases arising under the Constitution and laws of the United States, the jurisdiction of the circuit courts of the United States, given by that section, did not extend to those cases.

The words " all suits of a civil nature at common law or in equity," are sufficiently broad to comprehend " all cases in law and equity, arising under the Constitution and laws of the United States," and would have extended the jurisdiction of the circuit courts of the United States to those cases, but for the restraining words, " concurrent with the courts of the several States," provided the parties had been competent to litigate in those courts ; for, although Congress had power to give those courts jurisdiction of cases arising under the Constitution and laws of the United States, whatever might be the character of the parties, yet they had a right to restrict it to cases in which the character of the parties also would enable them to sue in those courts. Thus, in the case of *McClung v. Silliman*, the Circuit Court of the United States, although the parties were competent to litigate

in that court, had not jurisdiction of the case, because it was a "case arising under the laws of the United States," and the 11th section of the Judiciary Act of 1789 had not conferred upon the circuit courts of the United States jurisdiction in such cases. Although the parties were competent, yet the subject-matter of the controversy was not within the jurisdiction of the court. But if Congress, by the 11th section of the Act of 1789, had given to the circuit courts of the United States jurisdiction of all cases arising under the laws of the United States, although they should have confined that jurisdiction to the persons described in that section, the Circuit Court, in the case of *McClung v. Silliman*, would have had jurisdiction of the case; for the subject-matter of the controversy, as well as the parties, would have been within the cognizance of the court.

That Congress claim a right thus to discriminate between persons, in granting jurisdiction of cases arising under the laws of the United States, appears from their having granted it in the case of patents; and of the Bank of the United States; and of the Postmaster-General; and of all the officers of the United States, who, under the Act of the 3d of March, 1815, c. 782, § 4, [3 Stat. at Large, 244,] shall sue under the authority of any act of Congress. Congress could have given jurisdiction in those cases only on the ground that they were cases arising under the laws of the United States; for the characters of the parties did not furnish a ground, *per se*, of jurisdiction under the Constitution. See the *Postmaster-General v. Early*, 12 Wheat. 145, and *Osborn v. Bank of United States*, 9 Id. 825.

The words, "concurrent with the courts of the several States," therefore, in the 11th section, clearly excluded from the cognizance of the circuit courts, cases in law and equity, arising under the Constitution and laws of the United States. There are no such words in the 5th section of the Act of the 27th of February, 1801, which gives this Court its jurisdiction; nor any other words to qualify or restrict the full force of the words "all cases in law and equity."

The argument, therefore, which was drawn from the similarity of the language of the two sections which have thus been compared, entirely fails.

But it has been contended, in argument, before this Court, that the intention of the legislature is the best guide to the true construction of a statute; and that the statute must be construed now as it would have been at the time it was passed; and the Attorney-General, in his opinion, admits that this Court, when the case of *Marbury v. Madison* was decided, "possessed precisely the same power, in this respect, which it possesses now."

It was also contended, in argument, that as Congress had not thought proper, by the Act of 1789, to confer on the other circuit courts of the United States jurisdiction in cases arising under the Constitution and laws of the United States, it was not their intention to confer it on this Court, by the Act of the 27th of February, 1801.

If it was intended, by Congress, to confer on this Court the same jurisdiction only which it had conferred on the other circuit courts of the United States, it is probable they would, instead of enacting the 5th section, have referred to the laws giving that jurisdiction, as they had referred to them in the 3d section, for our powers. But the 5th section has no reference whatever to the jurisdiction given to those courts; and that jurisdiction, if referred to, would have been quite insufficient for the objects for which this Court was established. It would have given only the federal jurisdiction, and would not have provided a substitute for the State jurisdiction which had ceased to exist, upon the cession of the territory to the United States. The section, therefore, giving jurisdiction to this Court, was to be modelled so as to give the court all the federal and all the State jurisdiction. As there were no jealous rival jurisdictions here, it was unnecessary to discriminate between federal and State jurisdiction. The only judicial power which could be exercised here was the judicial power of the United States. The only concern of the framers of the law was to give jurisdiction in language broad enough to cover the whole ground of federal and State judicial power.

The jurisdiction, therefore, which is given to this Court, cannot be limited by the terms in which judicial power has been meted out to the other courts of the United States by the Constitution.

But it may be fairly inferred that Congress intended, by the Act of the 27th of February, 1801, to give this Court jurisdiction of cases arising under the laws and Constitution of the United States, because they had, on the 13th of the same month, given that jurisdiction, in express terms, to the other circuit courts, by the 11th section of the act of that date. By that section, it is, among other things, enacted, "that the said circuit courts, respectively, shall have cognizance of all cases in law or equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made, under their authority." "And also of all actions or suits, matters or things, cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof, where the matter in dispute shall amount to four hundred dollars, and where original jurisdiction is not given, by the Constitution of the United States, to the Supreme Court thereof, or exclusive jurisdiction, by law, to the district courts of the United States."

It would have been strange, indeed, if Congress should have given this jurisdiction to every other circuit court, and refused it to that of the District of Columbia, where there was no other court to take jurisdiction of those cases; where there was no jealous rival to be offended at the grant of jurisdiction; and where every possible case that can arise is a case arising under the Constitution and laws of the United States.

And still more strange would it be, if that should be adjudged to be the true construction of the 5th section of the Act of the 27th February, 1801, the words of which are so comprehensive that it was not necessary to introduce the words, "arising under the laws of the United States," after the words "all cases in law and equity;" for these words include all cases in law and equity, arising under the general laws of the United States, as well as under those adopted by Congress as the laws of this district.

That Congress had in view the Act of the 13th of February, 1801, when they passed the Act of the 27th of February, 1801, appears from the terms of the 3d section of the latter act, by which they say, that "the said court and the judges thereof shall have all the powers by law vested in the circuit courts, and the judges of the circuit courts of the United States."

Until the 13th of February, 1801, the office of a judge of the Circuit Court of the United States had never existed. The old circuit courts which were abolished on the 13th of February, 1801, had been always held by a judge, or judges of the Supreme Court, and the judge of the District Court, neither of whom was ever called, either legally, or in common parlance, a judge of the Circuit Court. The judges of the circuit courts, therefore, to whose powers reference is had in the 3d section of the act of the 27th February, 1801, must have been the new judges whose offices had been created by the act of the 13th of February, 1801.

That act was in full force on the 27th of February, 1801, and it is of no importance whether the courts which were thereby ordained and established, had or had not been organized, or whether the judges had or had not been appointed before the 27th of February. The reference, in the third section of the Act concerning the District of Columbia, to the circuit courts, and the judges of the circuit courts of the United States, must have alluded to the powers vested by law in those courts and judges as they were newly organized by the act of the 13th of February; and those powers would be the same, whether the new circuit courts were, or were not organized, and whether the new judges were, or were not appointed before the 27th of February. But, so far as the extent of the powers vested in this

Court by the act of that date is concerned, it is perfectly immaterial whether the reference in the third section of the Act is to the powers given to the circuit courts of the United States by the Act of the 13th of February, 1801, or by the Judiciary Act of the 24th of September, 1789, for the powers are the same; as appears by reference to the 10th section of the Act of the 13th of February, which is in these words:

“And be it further enacted, That the Circuit Court shall have, and are hereby invested with all the powers heretofore granted by law to the circuit courts of the United States, unless where otherwise provided by this act.”

The act of the 13th of February, continued in full force until the 1st of July, 1802. From the 27th of February, 1801, to the 1st of July, 1802, therefore, there could be no doubt as to the extent of the powers of this Court; and the construction of the Act of the 27th February, 1801, must be the same now as it was then, unless it has been altered by some act subsequently passed. None has since been passed, in any manner restricting the powers of this Court as they then existed. We still have, as we had then, all the powers which were by the 14th section of the Judiciary Act of 1789, vested in the circuit courts of the United States; which powers have been found abundantly sufficient (with the aid of some small powers given by subsequent statutes,) for the exercise of the jurisdiction given by the 5th section of the Act of the 27th of February. But none of our powers are derived from, or dependent upon, the Act of the 13th of February, 1801, or the Judiciary Act of 1789.

The 3d section of the Act of the 27th of February, 1801, does not refer expressly to any particular act of Congress, but to the powers which were then, by law, vested in the circuit courts, and the judges of the circuit courts of the United States; not the powers which had been, at any prior period, or might, at any future time, be vested in those courts and judges; but the powers as they then existed. Our powers were then as well ascertained and fixed as if they had been particularly enumerated and minutely described in the Act of the 27th of February, which established this Court. No subsequent alteration, or modification, or repeal of the powers of the other circuit courts could affect our powers; and there is nothing in the Act of the 27th of February which can justify the assumption that our powers “were to be the same with those of the circuit courts, and the judges of the circuit courts of the United States, as they should, from time to time, be vested by law in those courts and judges.”

As the Act of the 27th of February, 1801, was not in any manner dependent on that of the 13th of February, the repeal of the latter could not affect the former.

The Act of the 13th of February was referred to in the former opinion of this Court, for the purpose of showing that the cases of *McIntire v. Wood*, and *McClung v. Silliman*, would probably have been differently decided, if that act had been in force at the time of those decisions; because those cases were decided upon the ground that Congress had not, by the 11th section of the Act of 1789, given to the circuit courts of the United States, jurisdiction of cases arising under the Constitution and laws of the United States, which jurisdiction had been given by the 11th section of the repealed Act of the 13th of February, 1801.

Another motive for referring to that act was, to show that Congress had given to the other circuit courts, jurisdiction of cases arising under the laws of the United States, at the time when they gave jurisdiction to this Court, and thence to infer that they had conferred the same jurisdiction upon this Court.

In our former opinion it was said that the only point decided in the case of *McClung v. Silliman* was, that "a State court cannot issue a *mandamus* to an officer of the United States."

Upon examining the record of that case in the office of the clerk of the Supreme Court, it appears that there were two cases brought up by writ of error; one of them from the State court, and the other from the Circuit Court of the United States. The former was decided by the State court in 1815, and the other by the Circuit Court of the United States in 1821, or 1822. Both causes were argued before the Supreme Court as one case, and both were decided by that Court; so that the question respecting the jurisdiction of the Circuit Court was decided, as well as that respecting the jurisdiction of the State court. We were led into the mistake by the marginal note of the reporter, as well as by some expressions of the judge. Our mistake, however, did not affect our opinion.

We place no reliance on the difference between a case and a suit. If there is any difference, however, the word case is more comprehensive than the word suit. A case must exist of which a Court may take cognizance before a suit can be brought upon it.

After reconsidering the former opinion of the Court in this case, with all the light thrown upon it by the opinion of the Attorney-General, and the argument of the District Attorney, we are still of opinion that this Court has jurisdiction in cases arising under the laws of the United States, and that the cases of *McIntire v. Wood*, and *McClung v. Silliman*, so far from showing that it has not power to issue a writ of *mandamus* to a ministerial officer of the United States, afford strong ground of inference that it has the power, because it has that jurisdiction, the want of which was the ground of the decisions in those cases.

1. The Court is, then, obliged to consider the first reason assigned by the Postmaster-General for declining to obey the *mandamus*, which is,

That it is doubted whether the Constitution of the United States confers, on the judiciary department of the government, authority to control the Executive Department in the exercise of its functions, of whatsoever character.

A question of jurisdiction, however suggested, should always be well considered by the Court; and in the present case it has become a highly important question, as it involves the construction of the Constitution of the United States upon the respective powers and duties of two of the great constitutional departments of the government.

Before we proceed to examine the grounds upon which the supposed conflicting powers are respectively claimed, much discussion may be prevented by ascertaining, as exactly as we can, the extent of the powers claimed, and the points conceded on one side and the other.

In the first place the judiciary department is understood as disclaiming all right to control any executive officer in the exercise of functions, in the discharge of which he is to use his own discretion, or is legally bound to act according to the will of his superior. The word "control" seems in itself to imply that the party to be controlled has power to exercise his functions, or discharge his duty, in several different ways. It is not the word, therefore, which expresses correctly the kind of power or authority asserted by a court when it issues its *mandamus*. To "control" properly means to keep under check; to govern; to restrain. A *mandamus* is a simple command to a person to do an act which he is bound by law to do, and which he has no lawful right to refuse to do.

In the present case, the *mandamus* asked for is a writ commanding the Postmaster-General to do an act which a statute positively requires him to do; which he cannot lawfully refuse to do; and in regard to the doing of which he is not bound to act according to the will of any superior officer; the Court therefore, in issuing the *mandamus*, does not attempt to control him in his executive functions.

The question, therefore, proposed by the Postmaster-General, is not the true question presented in the present case. The abstract proposition, arising upon the case, is, that this Court has power to issue a *mandamus* to an executive officer of the United States, commanding him to do a ministerial official act which he is positively required by law to do; over which he has no discretion, and in regard to which he is not bound, by law, to act ac-

according to the will of another, and by his refusal to do which, an individual has sustained, or will sustain, injury. This seems to be the only claim of power which it is necessary for this Court to make, in order to support the *mandamus* in the present case.

On the other side it is admitted by the Attorney-General, in his opinion appended to the answer of the Postmaster-General, and was also admitted by the District Attorney in his argument, "that where a vested legal right has been violated by a public officer; or where a specific duty, on the performance of which individual rights depend, is assigned by law to an officer, and he refuses to perform it, the individual, who considers himself aggrieved, has a right to resort to the laws of his country for a remedy; and that the conduct of the officer is liable to be judicially examined; and that this, if ever doubtful, is now too well settled to be disputed. Actions of trespass, and other actions, for damages against collectors of the customs, officers of the army and navy, and other public functionaries, for official acts or omissions injurious to the vested rights of individuals, are of frequent occurrence; and it is not to be doubted that, through such actions, any officer of the government, the President included, may be held responsible in damages for the violation of any vested legal right. But these actions," (it is said) "are against the officer in his individual character, and do not imply any power, in the judicial tribunals in which they may be prosecuted, to supervise and control, in advance, the official action of the officer."

Again, in the opinion of the Attorney-General, it is said: "The obvious design of all these provisions," (that the executive power shall be vested in a President of the United States; that he shall take care that the laws be faithfully executed; and that he shall have power to appoint and remove the executive officers,) "was, to make the President responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department. Not that he should be liable to impeachment, or other criminal procedure, or to a civil action, for every illegal act, or culpable omission of each one of those officers." "Nor that the inferior officer should be exempt from personal liability to impeachment, indictment, or civil action, for any culpable act, or omission of duty, even though he may be able to plead, in his excuse, the express direction of the President. But it is possible for the President, through the heads of the executive departments, to give more or less attention to the proceedings of each department, and to take care that the laws concerning it be faithfully executed; and it is agreeable to reason, and to the rules of law, that where two persons unite in the performance of an illegal act, or in a culpable omission of duty, each, to a greater or less ex-

tent, and according to the circumstances of the case, should be personally responsible, although one of them may have an official superiority to the other. This species of responsibility it was the design of the Constitution to fasten upon the President; and hence it vests in him, and in him alone, with a few specified exceptions, the whole executive power of the government."

Again, he says: "It belongs to the legislature to create the executive departments; to define their powers and duties; to provide the requisite officers; to prescribe their various functions; and to make all other legal provisions, which may be necessary and proper to regulate the action of those departments. But when a law is once passed for the government of the executive officer, all that appertains to its execution falls under the care of the President. It is his province to instruct and command the officer; to remove him if he acts unfaithfully; and to appoint one in his place who will fulfil his duty agreeably to law."

The Attorney-General; also, at the commencement of his opinion, dated on the 19th of June, 1837, states the facts of the case as follows:

"The case proposed by you, in your communication of the 29th ult. and now presented, relates to the power of the Circuit Court of this District to issue a *mandamus* to the Postmaster-General, an executive officer of the United States, for the purpose of compelling him to perform an official act, alleged to have been enjoined upon him by a special act of Congress passed for the relief of the parties applying for the writ. This treats exclusively of certain claims depending in the Post-Office Department, and growing out of contracts with that department; it refers these claims to the Solicitor of the Treasury for settlement; and it directs the Postmaster-General to credit the contractors with whatsoever sum of money, if any, the solicitor shall decide to be due them. The duty, imposed by this law, is, therefore, in every sense, an official duty; it relates to the business of his department; it is imposed upon him by his name of office. The Solicitor of the Treasury has made an award, by which he decides that certain sums of money are due to the contractors; and the Postmaster-General has credited them with a part of these sums; but, for reasons satisfactory to his own judgment and sense of duty, has refused to credit the balance until directed so to do by a further act of Congress. The contractors have applied to the late President of the United States, to take order, by virtue of his constitutional duty to see the laws faithfully executed, for the crediting of the balance; but, being satisfied with the course of the Postmaster-General, he declined making any such order, and referred the parties to Congress for further legislative directions. The like application has been made to the

present Chief Magistrate, who deemed it inexpedient to interfere with the disposition of the subject made by his predecessor; and the parties now apply to the Circuit Court of this district for an order, in the form of a writ of *mandamus*, to the Postmaster-General to credit and pay the balance of the Solicitor's award, on the ground that this is a mere ministerial act, to the performance of which the applicants have a fixed legal right under the Act of Congress as it now stands, and for which they have no other adequatè legal remedy."

The admissions, in these extracts, respecting the personal liability of the executive officers, and the power of the legislature to create executive departments and officers, make it unnecessary to refer to the large class of cases in which the courts have decided that executive officers were liable, in actions at law, for injuries done to individuals by such officers, in the erroneous or illegal exercise of their functions, although acting under the orders of their superior officers, whose orders, if warranted by law, they were bound in law to obey.

It being admitted, then, that these executive officers are personally liable at law, for damages in the ordinary forms of action, for illegal, official, ministerial acts or omissions, the inquiry seems to be reduced to the question whether, when it is still in the power of an officer to do the act, the unlawful refusal to do which has already made him liable to an action at law for damages, the Court has not power to issue the writ of *mandamus*, commanding him to do it, instead of a *capias* to arrest his body for not having done it. What is there in the official character of the officer to deprive the Court of this power, or to render it improper in the Court to exercise it? Or, in the language of the Supreme Court of the United States in the case of *Marbury v. Madison*, we may ask, "If it be no intermeddling with a subject over which the executive can be considered as having exercised any control, what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid the Court to listen to the claim, or to issue a *mandamus* directing the performance of a duty not depending on executive discretion, but on particular acts of Congress and the general principles of law?"

"If one of the heads of the departments commits an illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were

any other individual the party complained of, authorize the process? It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of the executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and is, therefore, never presumed to have forbidden, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

The force of this opinion, it is suggested, is much impaired by the observations made by Chief Justice Marshall himself, in the subsequent case of *Cohens v. Virginia*, in 6 Wheat. 399, where he says, "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious: the question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in relation to the case decided, but their possible bearing in all other cases is seldom completely investigated. In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this," (that is, to the case of *Cohen*), "was whether the legislature could give this court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case; but in the reasoning of the court in support of this decision, some expressions are used which go far beyond it."

Here it is evident that the expressions alluded to were used in support of the decision that the legislature could not give original jurisdiction in such a case; and not those used in support of those parts of the opinion of the Supreme Court, in the case of *Marbury v. Madison*, which were cited by this Court in its former opinion, and which are again cited in this; and which are, there-

fore, in no manner affected by these observations of the Chief Justice, further than the maxim, which he lays down, may be supposed to affect the extent of the language used.

Whatever odium may be attempted to be cast upon those parts of the opinion of the Supreme Court in that case, and whether they can be considered as authoritative judicial decisions, binding upon this Court, or only as *obiter dicta*, yet they must be considered as the opinions of six learned judges constituting the highest judicial tribunal of the country to which can be referred the ultimate decision of all constitutional questions, never revoked nor reversed.

The sentiments they contain are based on the soundest principles of civil liberty, and have never been answered, and can never be answered, without invoking principles which tend to set the executive authority above the restraints of law.

But they are now attempted to be obviated, and we will consider in what manner.

It is premised that, by the theory of our government, the three great departments, the legislative, executive, and judicial, are to be kept so distinct that one cannot exercise any portion of the power which properly belongs to the other. That whatever power is in its nature executive, can be constitutionally exercised only by an executive officer; and whatever power is in its nature judicial, can only be exercised by courts and judges constitutionally established and appointed.

It is, then, contended that the Constitution, by declaring that "the executive power shall be vested in a President of the United States," and that "he shall take care that the laws be faithfully executed;" and by giving him the power of appointment and removal of all executive officers, has vested "in him and in him alone," with a few exceptions, "the whole executive power of the government."

"That the obvious design of these provisions was, to make the President responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department." "That the executive officers are his agents, for whom he is held responsible to the people, whose agent he is." That "the acts of the executive officers are the acts of the President; that constitutionally he is as responsible for them as if they were done by himself; though not morally. That, so far as regards the execution of the laws, therefore, no distinction can be maintained between the acts of the President and those of his subordinate officers. That in law they are all the acts of the President." That when a *mandamus* issues from the judiciary to an executive ministerial officer, commanding him to do a merely

ministerial act which he is absolutely required by an act of Congress to do, which he cannot lawfully refuse to do, and which the President cannot lawfully forbid him to do, it is said "they attempt to control the executive power, to assume the functions of the President, and to make themselves the executive in the last resort; superior to the executive created by the Constitution, and elected by the people."

This argument rests, almost entirely, upon the force of the word "control;" which, as before suggested, implies an interference with some right or power of the person to be controlled. To command a person to do what, by law, he is bound to do, and what he has no right to refuse to do, is not to control him in the exercise of any of his functions, but to compel him to execute them. Before it can be shown that such a *mandamus* as is above described would control the executive in any of its functions, it must appear that the executive has a discretion to do or not to do the thing commanded. If it has no lawful right to judge whether the thing shall or shall not be done, if it has no lawful authority to forbid the officer to obey the law, what function of the executive is interfered with by the *mandamus*? Will it be said that the officer has a right to refuse to obey the law, and throw himself upon his responsibility to the President? Or, that the President, throwing himself upon his responsibility to the people, has a right to command him to disobey the law? If such things should be done, they must be acknowledged to be violations of the law; and could only be done under a hope that the emergency of the case would palliate, if not justify, the act, and that the offence would be politically pardoned by the people. Will it be said that the officer has a right to refuse obedience to the law, and throw himself upon his personal responsibility in damages to the injured party? This would be a wrong done to the party; and a man can never have a right to do wrong.

But it is contended that the officer is officially responsible to the President alone; and that the President alone has the right to command him to do his duty; and that the Court has no right to do that which it is the duty of the President to do, namely, to command the officer to do his duty.

This proposition raises the questions, What is the relation between the executive and the judicial departments of the government? What is the line which separates the rights and duties of the one from those of the other? And how far one may tread upon the ground of the other?

The three great departments of this government are only branches of the sovereign power of the nation, each exercising its functions in the name and under the authority of that sovereign

power. When the President does an act in virtue of his office, it is the act of the sovereign power. So when the judiciary does a judicial act, it is still the act of the same sovereign power. When a *mandamus* is sent by a court to an executive officer, it is not the court that commands, but the sovereign power. All commands from the Court are issued in the name, and by the authority of, the United States. In each case, it is the whole sovereign power acting by its appropriate organ. The executive and judicial departments are not rivals. They must unite their functions, or the laws cannot be executed. The President is as dependent on the judiciary to enable him to see that the laws be faithfully executed, as the judiciary is on him to enforce its judgments. The moment a litigation arises, whether upon the law or the fact, the power of the President to see that the laws be executed in that case, by any other than judicial process, ceases until the litigation is closed by the judgment of the Court, and the sovereign power commands the proper executive officer to execute that judgment. The duty of the President is as obligatory to see the laws executed through the instrumentality of the judicial tribunals, as it is to see them executed when a resort to those tribunals is not necessary. The separation, therefore, of the executive from the judicial power, is not as complete as has been supposed. The executive cannot see that the laws be executed but in the due forms of law. The principles of *Magna Charta* are quite as obligatory upon our executive as the charter itself was upon the kings of England. *Nullus liber homo capiatur, &c., nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ.* No free man shall be seized, &c., nor will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. The words "*per legem terræ*," Lord Coke says, mean "by due process of law;" and that this chapter is but declaratory of the old law of England. (2 Inst. 50.)

In England, the whole sovereign power was, in ancient times, vested, or supposed to be vested, in the king. It was called his realm, his laws, his parliament, his judges, &c. The liberties, recited in *Magna Charta*, were said to be granted by the king to his subjects; and in the old statutes it is said that the king granteth, or ordaineth, &c.; and even now the statutes are said to be enacted "by the King's most excellent majesty, and with the advice and consent of the lords spiritual and temporal, and the commons," &c. And even when the authority of parliament was well established, only two powers were acknowledged in the government; the executive, and the legislative. The judicial was not known as a separate power; but was, both in theory and

practice, a part of the executive. The king, at the common law, by his prerogative, had the power, as chief magistrate of the nation, to erect tribunals of justice; to define their powers and duties; to create offices; and appoint and remove officers; and to appoint the judges, and limit the tenure of their office. There could be no contest between the executive and judicial power; for the whole was executive. The king had a control over the whole for the purpose of seeing that the laws were executed; and that power he delegated to his Court of King's Bench, it being the highest court erected under his authority. The other courts, however, sitting in Westminster Hall, are not inferior courts. In these courts, the king, in the eye of the law, is always present, though he cannot personally distribute justice. (1 Bl. Com. 270.) To these courts, therefore, in which the king was supposed to be always present, at least by his judges, it was not necessary that a writ of *mandamus* should issue. The Court of King's Bench, in issuing the writ of *mandamus*, can only be considered as exercising, for the king and in his name, that part of his executive duty which required him to see that the laws were faithfully executed; a prerogative conferred upon him, by the common law, for the benefit of his subjects.

The prerogatives of the king were of two kinds; first, those which belong strictly to the person of the king; and, second, such as regarded him in his political capacity only; as the supreme head, and chief magistrate of the nation; as the representative of the sovereignty of the people; as the administrator of the laws, and as the general conservator of the peace of his dominions.

This second class of prerogatives passed from the king to his colonies, and was exercised under the charters, or royal governments, which, by virtue of his prerogative, he granted or established in this country; and, at the Revolution, passed from them to the several States as they respectively assumed self-government.

The writ of *mandamus* was founded upon the king's prerogative of seeing that the laws were faithfully executed, and is, therefore, called a prerogative writ. It was one of the means by which he executed that part of his duty. It was, in truth, an executive proceeding through the instrumentality of his court.

When the prerogative came to this country, and was received into the colonies as part of their respective laws and systems of government, it was accompanied by the judicial aid of a writ of *mandamus*, to enable the executive power to see that the laws were faithfully executed. It has been before observed, that the executive power cannot cause all the laws to be executed without the aid of the judicial, because the laws must be executed by due

process of law. Thus the bringing of a man before the Court is an executive act, but it must be done in due form of law. For this purpose the sovereign power, by means of a judicial tribunal, sends a writ, commanding the executive to take the body of the person and bring him before the Court. When the cause is decided and judgment rendered, the same sovereign power sends to the executive another writ commanding him to see that the judgment be executed. Why is not this an interference with the functions of the executive? Because the executive cannot perform its duty of seeing the laws faithfully executed without the intervention of the judicial power.

So, the executive cannot execute the same duty, even in regard to a subordinate executive officer, where the rights of a third person are concerned, without the intervention of the judicial power, by means of a writ of *mandamus*, in cases where that is the appropriate remedy; for the only other power which the executive has to cause the law to be executed in that case, is to remove the officer and appoint another. But this does not execute the law; and if it should be the means of causing the law to be executed, yet, whether that means would be used or not, would depend upon the will of the executive, or upon his opinion of the law, or of the manner in which it ought to be executed; and whatever that opinion might be, it could not be obligatory upon the injured individual; and if that opinion should be against him, the case must still be referred to a judicial tribunal, before the executive would be able to cause the law, in that case, to be executed. A writ of *mandamus*, therefore, is as much a means given to the executive to enable him to cause the laws to be faithfully executed, as a common *capias ad respondendum*, or a *feri facias*, or any other writ devised by the judicial power, is to enable the executive to discharge that important duty. Surely, the executive cannot complain that the court has furnished him with an additional means of discharging his duty. There is no more interference of the judiciary with the executive, in one case than in the other. Surely the President, upon whom is devolved the high prerogative of seeing that the laws be faithfully executed, will not object to the court's furnishing him with the high prerogative writ which enables him to execute that high prerogative.

When, therefore, we look closely into the nature of judicial and executive power, and see how nearly they are allied; when we see how necessary they are to each other in the discharge of the duties of both departments; when we look into the origin and nature of the writ of *mandamus*, and find it to be a prerogative writ to enable the executive, by means of the instrumentality of the courts, to exercise his high prerogative of seeing that the

laws are faithfully executed; when we see that the executive may not be able to cause the law to be executed, without the intervention of the court; (for if, as the Postmaster-General asserts in his answer, "the whole power of the Court would be impotent to control an honest man, if he were conscientious in his refusal," surely he would not be coerced by the fear of removal); when we find that the king of England, long before our Revolution, had submitted this part of his prerogative, as well as many other of his executive powers, to his courts; that the right to issue this writ, as well as the writs in the other forms of action, had been delegated to these courts, and that this right came to this country, and was adopted and used by the courts as part of their judicial power, (although it was originally an executive function,) and thereby became part of the judicial power; when, also, we consider that the Court has, confessedly, the power to call the officer before it, in some form of action, to examine into the legality of the manner in which he has discharged his official functions, in the particular case presented to the court for its consideration, and to render judgment against him for damages, if he has acted illegally, even though he acted under the orders of the President; when we find that a writ of *mandamus* is often used to enable a party to obtain a specific legal remedy, which he could not obtain by any other form of action, we cannot see why the official responsibility of the Postmaster-General to the President, whatever it may be, should prevent the Court, at the instance of the supposed injured individual, from inquiring, in this form of action, whether the officer had or had not discharged the duty required of him by law, in relation to that individual.

It is true that the Postmaster-General has the same right which every other man has, when he has a duty to perform, to decide whether he will perform it or not, or in what manner he will perform it. But then he decides at his peril, and for himself alone. His judgment cannot bind any other person, nor give any validity to his act. The President, also, as between him and his subordinate officer, may decide, for himself, whether the officer has discharged his duty; but that decision cannot bind a third person. Whatever the responsibility may be, between the officer and the President, it is no concern of the injured individual; it is only an official responsibility which does not affect him. And as to the responsibility of the President to the people, it is a mere political responsibility to the public, at the ballot-box, which, if effectual, in fact, as to the President, would afford no satisfaction to the applicant for redress.

But it is said that "the sole constitutional function of the judges is to expound the laws." That if the law is so plain as

not to need exposition, there is no case for judicial cognizance, and the law may be executed by the executive, without judicial intervention. Hence, it seems to be inferred, that, as the Court, in its former opinion, admitted that the law was plain, this is not a case cognizable by a judicial tribunal.

The only answer necessary to this objection is, that it is the duty of the Court, not only to expound, but to enforce, the law; that although the law may be plain, and the facts plain, yet if the defendant refuses to obey the law, some sort of judicial process may be necessary to compel him to obey it; and such process cannot be obtained but in due course of law, and in a case brought judicially before the proper tribunal.

Again, it is contended, that, as the Court has no power to execute its judgment without the aid of the executive, it has no power to issue the writ.

The argument, in favor of this seeming *non sequitur*, is as follows: "The sole constitutional function of the judges is to expound the laws. It is the function and duty of the executive to see them faithfully executed." "If the laws could be precisely adapted to every case, there would be no need for a judiciary to expound them. The executive authority could proceed, forthwith, to carry them into execution." "The practical exercise of executive power is more remote in cases which go before the judicial tribunals, but it is the same in principle." "Laws which require no exposition are executed without the intervention of the judicial power. Laws which require exposition are executed after that exposition has been given by the judicial power; but, in both cases, the execution is, or should be, according to the Constitution, exclusively the work of the executive." "The judges have no effectual means of executing the law. They might imprison the executive officer, but they could not remove him. Imprisonment might not accomplish the object. The Court could not guide his hand nor control his will. If he were conscientious in his refusal, or wished to appear so, no imprisonment, nor pains, nor penalties could compel him to do an act which, in his opinion, violated his oath of office. The whole power of the Court would be impotent to control an honest man."

"The inadequacy of the judicial process, and the ample power vested in the President, are conclusive proof that the President, and not the Court, was intended to be the controlling authority in all such cases." "Suppose the laws require a specific act of the President himself, involving private rights, which he refuses to perform. The courts have as much law for issuing a *mandamus* against him as against any of his subordinates, in a like case. It is a case, as much as that of which the Court has already assumed

jurisdiction. The President disobeys the *mandamus*, and they send an attachment. By whom do they send it? By a marshal holding his office at the will of the President, who can strike their process dead in his hands, by dismissing him on the spot. This fact proves the absurdity of the power assumed. And that which the President can legally do to protect himself he can do to protect any of his agents; being always responsible to his country for the proper exercise of his power. But suppose the Court succeed in arresting the President, and put him in the county jail; where then is the supreme executive power of this great Republic? Transferred from the President's house to the City Hall. From the chief magistrate elected by the people of the whole United States, to the three judges of the District of Columbia. The arrest and imprisonment of an executive officer, as such, involves the same principles, and would lead to the same consequences, in a greater or less degree according to the importance of the station held by him." "The idea that courts are the only places where wrongs of all sorts are to be redressed, and the judges the only dispensers of right, is an error. Where the inferior executive officer, or even the President himself, refuses to perform his executive duties, there is an obvious mode of redress, without the interposition of the judicial authority.

"If a subordinate executive officer refuses to perform a ministerial act positively enjoined upon him by law, the injured citizen may appeal to the President, whose duty it is to take care that the laws be faithfully executed, and has power to turn out a perverse subordinate. If the case be so very plain, the President will, at once, enforce an execution of the law, and the citizen will have effectual redress; 'though this Court has not jurisdiction.' If the case be not so very plain, the matter may be referred back to Congress, to make it plain by further legislation. And thus the citizen would have complete redress, without the aid of the Court. There is a process by which the President himself may be reached for a perverse refusal to execute the laws, or take care that they be executed, and a chief magistrate, who will do his duty, put in his place.

"Thus there are ample means provided by the Constitution to enable the citizen to obtain his rights at the hand of the executive, without erecting any court into a supreme controlling power over the President and the whole corps of executive officers.

"Indeed, the Court has not, in the Constitution and laws, the means to give redress in such cases.

"Before they can control the President, they must assume the power to appoint their own marshal, and execute their own mandates. They must do more; they must proceed to the executive

offices ; must enter credits with their own hands ; must issue warrants ; and, finally, with their own hands, take the money out of the treasury."

"The existence of such a power in the judiciary is repugnant to the whole theory of the Constitution. Its effectual exertion, if it were practicable, would defeat the President's power of removal, would take away his responsibility for the faithful execution of the laws, and would transfer to the judiciary, in the particular case, the whole executive power ; for it is palpable that if the President, under the belief that the faithful execution of the law will be best secured by not doing a particular thing which is demanded by a third party, so directs the executive officer, and the Court, on the application of such party, issues a *mandamus* commanding it to be done, and the writ is obeyed, it is the Court, and not the President, that exercises the executive power ; and the distribution of powers, so carefully fixed by the Constitution, is unsettled and overturned. But its effectual execution is not practicable ; because the President's power of removal cannot be restrained ; and by its exercise he can readily defeat any command which the judiciary may address to the executive officer.

"To illustrate this, let us suppose that the Circuit Court of this district issue a peremptory *mandamus* to the head of one of the departments, commanding him to execute any particular law, concerning his particular duties, in a given way, and that the officer refuses obedience and is attached and committed for the contempt. This is the end of judicial power in a case of *mandamus* ; but suppose that at this stage of the proceedings the President interferes by removing the officer and appointing a successor, what then becomes of the judicial remedy ? The act can only be performed by a person holding the office ; the individual, in the custody of the Court, no longer holds the office ; it has been legally taken from him ; and if he were ever so willing to perform the act, he has no longer the ability to do so. The proceeding must then be abandoned, or commenced *de novo* against the new officer ; to be frustrated, if the President thinks proper, at the same stage, as often as the Court shall reach it. If it be said that this is supposing an extreme case, and that the President, from respect to the judiciary, would probably suffer the officer to obey the *mandamus* rather than to exercise the constitutional power of removal ; the answer is, that the very existence of such a power, whether it be used or not, is fatal to the claim of jurisdiction ; and that cases may easily be supposed, in which the President, with the strongest desire to avoid a conflict with the judiciary, may yet have no alternative but to use it.

"In cases which properly refer themselves to the judiciary, it

is rarely, or never, possible to defeat, in this way, the ultimate execution of the judgment of the Court ; and the fact, that without the consent of the executive department, a peremptory *mandamus*, to an executive officer, must forever remain inoperative, exhibits, in the clearest light, the incapacity of any court to issue the writ."

The argument, upon this point, has been thus fully stated, in the language of the return of the *mandamus*, and of the opinion of the Attorney-General of the United States, annexed to it, that its full force may be perceived. It is, in substance, that the Court has no power to issue the writ, because the President could defeat its execution by dismissing the marshal who comes to serve an attachment of contempt, which is the regular process to enforce obedience to the mandate ; or by dismissing the officer to whom the *mandamus* is issued after he shall have been committed on the process of contempt ; that is, that although the Court shall have lawful authority to issue the writ, the President may, by his power of removal, prevent the execution of the lawful judgment of the Court. But the President cannot lawfully defeat the execution of those laws which he is bound by the injunction of the Constitution itself, and his own solemn oath, to see faithfully executed. If it was only meant to say that the President could thus defeat the execution of the judgment of the Court, in a case in which it had not jurisdiction, his right to do it may be admitted ; but his power to do so, in a case in which the Court had jurisdiction, is no evidence of the want of jurisdiction in the Court. It is equally in the power of the President to defeat the execution of every other judgment of the Court.

It is true that the Court must depend upon the executive power to execute its judgments ; but that power is abundantly able, and bound by the most solemn obligations to do so. The supposed imbecility of the Court, therefore, does not exist ; and if it did, the argument equally applies to every other case of which the Court has cognizance.

The idea that the President may defeat judicial process, by striking it dead in the hands of the marshal, by dismissing him on the spot, when he comes to serve it upon an executive officer, is not supported by law ; for, by the 25th section of the Judiciary Act of 1789, it is enacted, that "Every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands, respectively, at the time of such removal, or expiration of office."

The argument, therefore, raised upon the inability of the Court to enforce its judgments, we think, entirely fails.

But it is said, that, "from an early period, the writ of *mandamus* has been used by the English Court of King's Bench as a means of enforcing its general supervisory jurisdiction over courts, magistrates, and ministerial officers inferior to that tribunal," "but we find no instance of its being directed to an officer of the executive departments." It is admitted, then, that this Court, "in aid of its appellate jurisdiction, may issue this writ in all cases where any act, necessary to the exercise of that jurisdiction, shall be omitted to be performed by an inferior tribunal, or officer." But in all other cases it seems to be denied. The books, it is true, speak of inferior tribunals, but not of inferior officers. Blackstone says: "A writ of *mandamus* is, in general, a command, issuing in the king's name, from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing, therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or, at least, supposes, to be consonant to right and justice." 1 Bl. Com. 110.

We do not think it necessary that the person or the officer to whom a writ of *mandamus* may issue, must be, in any sense, inferior, in point of official relation to the Court.

Whether there have or have not been cases of *mandamus*, in England, directed to executive officers, we have not had time to inquire; but we find it stated in 1 Chitty's General Practice, p. 802, that, "when it is the duty of an officer of the excise to grant, and he should refuse, a permit to remove wine, the Court would compel the delivery of a proper permit," (by *mandamus*); for which he cites *Rex v. Commissioners of Excise*, 2 T. R. 381; *Rex v. Cookson*, 16 East, 376; *Rex v. Commissioners of Liverpool*, 2 Maule & Sel. 223.

In the case in 2 T. R. 381, 385, speaking of the commissioners of excise, it was said by counsel, and not denied, that "their office, in this respect, is merely ministerial, and they have no discretion." The court, in that case, refused the *mandamus* only on the ground that the relator had not made out his right to the permit.

But we do not think it material to show that writs of *mandamus*, in England, have been issued to the executive officers of the crown. There is a material difference between those crown-officers and the executive officers of the United States. The king of England is the fountain of all office and honor. He creates the offices, and prescribes, from time to time, such duties as he thinks proper. The officers are exclusively his officers—his agents, to act, in all things, according to his will.

In the United States, by the Constitution, all offices are to "be established by law." The President cannot appoint an officer to any office not established by law. The legislature may prescribe the duties of the office, at the time of its creation, or from time to time, as circumstances may require. If those duties are absolute and specific, and not, by law, made subject to the control or discretion of any superior officer, they must be performed, whether forbidden or not, by any other officer. If there be no other officer who is, by law, specially authorized to direct how the duties are to be performed, the officer, whose duties are thus prescribed by law, is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other person. He is the officer, not of the President who appoints him, but the officer of the sovereign power of the nation. He is the officer of the United States, and so called in the Constitution, and in all the acts of Congress which relate to such officers. He is responsible to the United States, and not to the President, further than for his fidelity in the discharge of the duties of his office, unless the President is, by express law, authorized to assign him duties over and above those specially prescribed by the legislature. Such an officer is the Postmaster-General. As the head of an executive department, he is bound, when required by the President, to give his opinion, in writing, upon any subject relating to the duties of his office. The President, in the execution of his duty, to see that the laws be faithfully executed, is bound to see that the Postmaster-General discharges, "faithfully," the duties assigned to him by law; but this does not authorize the President to direct him how he shall discharge them. In that respect, the Postmaster-General must judge for himself, and upon his own responsibility, not to the President, but to the United States, whose officer he is.

The President himself, although called, by the Postmaster-General, in his answer, "the highest representative of the majesty of the people, in this government," is but an officer of the United States, the head of one of the departments into which the sovereign power of the nation is divided; and, as that is the executive department, he may, with propriety, be called the chief magistrate of the United States. The officers of the United States being thus specially charged, by law, with duties independent of executive control,—duties which they are bound to execute according to their own judgment, stand on ground different from that occupied by the English executive officers, whose offices are created, and whose duties are assigned, by the king. These have no positive, specific, legal duties to perform which can be the subject of *mandamus*; they are the mere agents or servants of

the king, and responsible only to him; all their acts being subject to his will. No definite right of a third person can grow out of duties of that description, where every act of the officer is subject to the control of his superior. If an application should be made to the Court of King's Bench, for a *mandamus* to such an officer, commanding him to do some official act, the answer would be that the officer has no will of his own; that he can act only as he shall be directed by the king. If the king has not ordered the thing to be done, the officer is not bound to do it. If the king has ordered it, he is competent to enforce his order.

There is no analogy, therefore, between the executive officers of the king of England, and the executive officers of the United States, in regard to the nature and foundation of their respective duties, so far as regards the proceeding by *mandamus*; and the fact, if it be a fact, that there are no English cases of *mandamus* against the officers of the crown, affords no reason why a *mandamus* should not issue against an executive officer of the United States.

In the former opinion of this Court, given upon the rule to show cause, it was suggested "that the relation between the Postmaster-General and the President of the United States, was different from that which subsisted between the President and the other heads of departments, in this, that they, in the very terms by which their offices were created and their duties defined, are to perform such duties, and execute such orders, as they shall be required to perform and execute by the President of the United States."

"The Postmaster-General, however," (it was said,) "bears no such relation to the President. We cannot find a word in the law under which he was appointed, or in the various laws of the Post-Office Establishment, or in the Constitution of the United States, which intimates any connection between him and the President; or any authority in the President, to prescribe his duties or control him in the exercise of his official functions." We were not certain, at that time, that the Postmaster-General could be considered as the head of an executive department, within the meaning of the Constitution.

We are now, however, inclined to think that he is; and that, therefore, there is that connection between him and the President which results from the right of the President to call upon him for his opinion in writing upon any matter appertaining to the duties of his office; and from the President's power of appointment and removal.

With the exception of the circumstance that the Postmaster-General is to be considered as the head of an executive depart-

ment, we think our former opinion as to the duties of his office, and his official relation to the President, is correct.

The doubt, respecting its being an executive department, was, perhaps, reasonable, considering that the first law, in 1792, was "An Act to establish the Post-Office and Post-Roads within the United States," in which it is not called a department. It authorizes the Postmaster-General to appoint "an assistant," and "deputy-postmasters." The Postmaster-General was to receive all the revenues and pay all the expenses. That act was followed by the Act of the 8th of May, 1794, having the same title. This act contains the same provisions as those of the last, and does not call it a department. This was followed by the Act of March 2, 1799, entitled "An Act to establish the Post-Office of the United States." This act speaks of those who may be employed "in any of the departments of the General Post-Office." It also directs that the Postmaster-General shall superintend the business of the department in all the duties that may be assigned to it." It is not, afterwards, in the act, called a department, but it speaks of copies "under the seal of the General Post-Office;" and of the regulations "of the Post-Office." This was followed by the Act of the 30th of April, 1810, entitled "An Act regulating the Post-Office Establishment," which uses the same expressions in the same way, and speaks of debts due "to the General Post-Office."

Thus stood the law until the Act of the 3d of March, 1825, entitled "An Act to reduce into one the several acts establishing and regulating the Post-Office Department." The body of the act uses the terms "Post-Office Establishment," "General Post-Office," "the said Department," and "the Department," but the terms "Post-Office Department," are not used in the body of the act.

By the Act of the 2d of March, 1827, \$2,000 were added to the salary of the Postmaster-General, making it \$6,000 per annum.

Thus the matter stood until the Act of the 2d of July, 1836, entitled "An Act to change the organization of the Post-Office Department; and to provide more effectually for the settlement of the accounts thereof;" which, throughout the body of it, calls it "the Post-Office Department," and which, for the first time since the year 1792, introduced the agency of the President into the department by giving him the appointment, with the advice and consent of the Senate, of all deputy-postmasters whose commissions amount to \$1,000 annually.

The first act, (22d September, 1789,) under this government, respecting the Post-Office, was temporary, and merely provided

for the appointment of a Postmaster-General, referring, for his powers, to the regulations established by the Congress of the Confederation, and declaring "the Postmaster-General to be subject to the direction of the President of the United States, in performing the duties of his office, and in forming contracts for the transportation of the mail." This act was continued from session to session until the Act of 1792, when the office was removed from all control of the President; and in all the subsequent acts until 1836 there seems to have been a marked anxiety to keep it out of his hands, probably fearing, or foreseeing, the great addition it would make to his patronage.

And when, in 1813, the President wished to have a mail sent from the head-quarters of the army to any particular post-office, it was deemed necessary to obtain an act of Congress to enable him to direct the Postmaster-General to do it.

Although the word "Department" had crept, incidentally, into the Acts of 1799 and 1810, yet it was not generally considered as being one of the executive departments, until so called in the Act of 1825; and it was not until his salary was raised to \$6,000 that he was admitted into the cabinet in 1829. There was nothing in the earlier acts respecting the Post-Office which could indicate an intention to create a new executive department, except the power given to the Postmaster-General to appoint "an assistant," and "deputy-postmasters," a power which Congress could not constitutionally vest in him, unless he were the head of a department.

It required, therefore, a critical examination, and a comparison of the Constitution with the acts of Congress, to discover that it was such a department as is contemplated by the Constitution.

This investigation of the several acts of Congress, respecting the Post-Office, affords some ground of excuse for having, at first, doubted whether the Postmaster-General was the head of a department, within the meaning of the Constitution; and at the same time shows that the relation in which he stands to the President, so far as regards the President's right to control him in the discharge of his official functions, is very different from that of the secretaries, who are bound by law to act according to his will. Indeed, it is admitted, in the opinion of the Attorney-General, that the President can control him in his official functions, only "when not prescribed by law."

The Court, therefore, is confirmed in its opinion, before expressed, that the Postmaster-General, in the faithful discharge of those duties which are prescribed by law, is not lawfully subject to the control of the President. The President's power of controlling an officer in the exercise of his official functions, is limited,

we think, to those functions which are by law to be exercised according to the will of the President ; and where the order of the President would be a justification in law. In such cases only can the President withdraw the officer from the jurisdiction of the Court and cover him with the mantle of his own responsibility. Whenever that is the case, or whenever the officer himself has a legal discretion, and can plead that discretion, as a justification for refusing to do the thing sought to be commanded, this Court disclaims all power to issue the writ.

In the case of *Martin v. Mott*, 12 Wheaton, 31, the Supreme Court says : " Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

The argument upon this part of the case seems to apply rather to the form of the action, than to the ultimate responsibility of the officer ; to the preventive rather than to the retributive, powers of the Court.

To this point we would apply the language of the Supreme Court of the United States in the case of *Osborn v. The United States Bank*, 9 Wheat. 843 : " It is admitted that the privilege of the principal is not communicated to the agent ; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, and that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him ? Why may it not restrain him from the commission of a wrong which it would punish him for committing ? " " Will it be said that the action of trespass is the only remedy given for this injury ? Can it be denied that an action on the case, for money had and received to the plaintiff's use, might be maintained ? We think it cannot ; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party. In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only ; and what agent could make compensation for such an injury ? The remedy would have nothing real in it. It would be a remedy in name only, not in substance."

Upon the whole, then, I am authorized to say, that it is the

unanimous opinion of the Court, that this Court has jurisdiction and power to issue the writ of *mandamus* in this case.

It is a jurisdiction which this Court has not sought ; but it is one which it cannot shun ; and we say, in the language of the late Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *Cohens v. Virginia*, 6 Wheat. 404 :

“It is most true that this court will not take jurisdiction, if it should not ; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid ; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.”

And we will add, that we feel a consolation in knowing that our judgment may be subjected to the supervision of a higher tribunal.

Let the peremptory *mandamus* be issued.

On the 13th of July, the peremptory *mandamus* having been ordered, the Court adjourned to Monday, the 14th of August, on which day, the *mandamus* having been served on the 19th of July,

Mr. Coxe, for the relators, moved for an attachment against the Postmaster-General, for not obeying the writ ; and

Mr. Key, for the Postmaster-General, moved the Court to quash the *mandamus*, because it was issued on the 17th of July, after the Postmaster-General had, on the 15th of July, sued out a writ of error to the judgment of the Court, rendered on the 13th, awarding a peremptory *mandamus* ; and had given an appeal-bond in the penalty of \$500, with sureties approved by the chief judge, and filed a copy of the writ of error.

Mr. Coxe contended, that a writ of error would not lie in such a case as this ; that it lies only in cases where judgment has been rendered for damages or costs under the Statute of 9 Anne, c. 20 ; which statute applies only to cities, boroughs, and corporations. *Dean & Chapter of Dublin v. Dowgatt*, 1 P. Will. 348 ; 1 Bro. Parl. Ca. 73 ; 3 Id. 505 ; the case of *Wheelwright v. The Columbian Ins. Co.* 7 Wheat. 534.

That the appeal-bond ought to have been sufficient to cover the whole debt claimed, and that a bond for \$500 only, could not be a *supersedeas*. The order for a peremptory *mandamus* is not such

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a final judgment as will justify a writ of error. *Wallen v. Williams*, 7 Cranch, 278; *Callett v. Brodie*, 9 Wheat. 553.

Mr. Key, contra. The writ of error was a *supersedeas* to the judgment, awarding a peremptory *mandamus*; the writ, therefore, was improvidently issued, and ought to be quashed. This Court cannot quash the writ of error. It is a *supersedeas* whatever may be the amount of the bond. *Callett v. Brodie*, 9 Wheat. 553. The defendant is a public officer. This is a proceeding against him as such, to compel him to do an official act. The money is safe in the Treasury of the United States, or in the custody of the law. It is only necessary to give bond to cover the costs.

The COURT (THRUSTON, J., absent,) refused to quash the *mandamus*, considering the writ of error and bond as a *supersedeas*, and refused, therefore, to grant an attachment for not obeying the writ.

Judgment affirmed by the Supreme Court. 12 Peters, 524.

FRANCIS DODGE v. MATTHEW S. VAN LEAR.

A written memorandum made by the plaintiff in his day-book, not signed by either of the parties, or by any person for either of them, and proved, by oral testimony only, to have been made in the presence and with the consent of the defendant, and corroborated by the defendant's letters, not referring particularly to that memorandum, nor stating the terms and consideration of the contract, is sufficient to take the case out of the 17th section of the statute of frauds; and it is competent for the jury to connect the letters with the written entry; and the same, taken together, constitute legal and valid evidence of a written contract, in conformity with the requisitions of the statute of frauds.

If a contract be absolute to deliver flour on or before a particular day, the vendor will not be excused by an obstruction of the navigation on the canal.

It is not material whether the defendant had, or had not the flour on hand at the time of the contract.

ASSUMPSIT, upon a contract to deliver 1000 barrels of flour; half on the 5th, and the residue on the 15th of May, 1835. On the 30th of March, 1835, the defendant, being concerned with others in a large flour-mill in or near Williamsport, in Maryland, and having a large quantity of flour on hand, and being in the plaintiff's warehouse in Georgetown, agreed to sell to the plaintiff 1000 barrels of flour, of the defendant's brand, at \$4.75 per barrel, to be delivered in Georgetown, half on the 20th, and half on the 30th of April, 1835. The plaintiff, in the presence and with the assent of the defendant, made the following written entry in his day-book, as a memorandum of the agreement, under date of the 30th of March, 1835:

"Bought of Mr. Van Lear 1000 barrels his brand flour a \$4.75, to be delivered, half 20th April, and half by 30th; if not here then, I am to be off or not, as I please. $\frac{1}{2}$ D. & Dodge."

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The words and figures " $\frac{1}{2}$ D. & Dodge" were not written until after the defendant had left the warehouse. They were understood to mean that the firm of Davidson and Dodge, consisting of one John Davidson, and the plaintiff's son, Francis Dodge Junior, were to take upon themselves one half of the amount of the contract. It was afterwards agreed between the plaintiff and the defendant that the time of delivery of the flour should be extended to the 5th and 15th of May, 1835.

Upon his return to Williamsport, the defendant wrote to the plaintiff on the 6th of April, 1835, saying that a breach in the canal would probably interrupt the navigation for a month, and render it impracticable to fulfil the contract made with the plaintiff, and requesting an extension of time for thirty days longer. He says, "if boats can be procured from above, a part of the flour, and perhaps the five hundred barrels, can be delivered in due time. But for fear that things may occur to prevent, over which I have no control, I want to know from you, by return mail, whether you will extend the time. I am anxious to live up to the contract, and have the same offer that you made, and an extended time. The canal navigation is so precarious it is out of the question to make any calculation with certainty. My brother will be down as soon as the canal opens."

To this the plaintiff replied, on the 7th of April, "yours of 6th, is received. We must extend the time for the delivery of the contract flour, but hope it will yet be here within the time; say 20th and 30th April. We shall of course claim the first which comes from your mill, and until all can be delivered; and if, in consequence of breaks in the canal, it be kept back until 5th and 15th May, we will not object; and if not here then we are to still take it or not as we please. On receipt of this, please write and inform when you expect to get it here, &c., and when the four hundred and twenty will be down. We intend to stick to the contract, (although it dont promise any profit,) if it can be placed here before too long a time; and must be liberal when the canal will not permit its coming. Yours, Fra. Dodge."

"You ask for thirty days; I suppose you mean from the time you wrote."

On the first of May, 1835, the plaintiff wrote to the defendant as follows:

"As you have not been able to deliver the flour, (say now behind 1275 bbls.,) we must extend the time still further and until you can get it here. I sold my half of the last 1000, at 4.80, to a New York man, and he is anxious to have it delivered. We shall rely on its delivery, and in the shortest possible time.

"Yours,

FRA. DODGE."

"Flour — 4.90 to 5 — sales."

On the 7th of May, 1835, the defendant wrote to the plaintiff as follows :

“ Your two letters of 7th of April, and 1st of May, are before me ; the former extending the time for the delivery of the flour contracted to be delivered on the 20th and 30th April to the 5th and 15th of May, as requested by me in my letter of the 5th of April, and the latter still wishing to extend the time without any limit, or, according to your construction of the contract, as long as flour remains above the contract price. Now, sir, my view of the contract is entirely at variance with that construction.

I made every exertion to deliver you the 1000 bbls. of flour by the first contract on the 20th and 30th April ; say 500 bbls. on the 20th, and 500 bbls. on the 30th April. But finding it impossible, from circumstances not within my control, to make good that contract, I asked, by letter of the 5th of April, for an extension of time for thirty days, say 5th and 15th May ; the same things having occurred, as before, to prevent its fulfilment, I considered it null and void after that time. I never would, and I never did make a contract so entirely against myself ; for if flour had fallen, you would not, of course, have given me one day after the specified time, say 5th and 15th May ; and it would not have been in my power to have delivered ; therefore according to your view of it it is a complete one-sided bargain, and such a one as an idiot would have made.

“ You will perceive, by reference to my letter, that I asked for and obtained, a certain number of days, say thirty. I therefore consider myself absolved from the first part of the contract, namely, the 500 bbls. to be delivered on the 5th of May. And still consider myself bound to deliver the other 500 bbls. by the 15th, if practicable to do so.

“ Yours,

M. S. VAN LEAR.”

To this, the plaintiff replied on the 11th of May, as follows :

“ Yours of the 7th is received, and I am really astonished at your not being willing to deliver the 1000 bbls. of flour as contracted for. I have been very particular throughout, and in mine of the 7th, in which I gave you the extension asked for, I then restated the original bargain, that if not delivered at the time, say 5th and 15th May, I was to take or not as I pleased ; and although there was no obligation, on my part, to say any more, yet I thought best to say on the 1st inst. that we would still take it, and gave the unlimited time thus stated, in doing of which I, of course, would risk a fall of price. Now, Sir, I hope, upon reflection, that you will not think of refusing to comply with this contract ; it will be altogether what I could not have expected from you. I am sure no one would say that you are not bound to deliver, and I must insist on its being done. It

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is no longer my interest to any amount, as I sold the contract for five per cent. profit; and assured the purchaser that there was no doubt of its being complied with on your part; this refusal I could not have believed possible; dont omit to deliver it. I bought it at first more to accommodate you than from any profit I expected. Yours, Fra. Dodge."

Upon the trial, the plaintiff's counsel offered to examine Francis Dodge, Jr., one of the firm of Davidson and Dodge, as a witness, and produced an instrument in writing dated the 16th of May, 1835, signed by Davidson and Dodge on one part, and Francis Dodge, (the plaintiff,) of the other part, rescinding the agreement, by which they were to take one half of the contract. The defendant objected that the witness appeared, by the memorandum, to be interested; but the Court overruled the objection, and he was sworn and examined.

Upon this evidence the defendant prayed the Court to instruct the jury that the plaintiff could not recover, because no part of the flour was delivered at the time of the bargain; no earnest money paid, and no note or memorandum, in writing, of the bargain made and signed by the parties or their agents, as required by the 17th section of the statute of frauds and perjuries.

But the COURT (CRANCH, C. J., *contrà*,) refused to give the instruction; and at the prayer of the plaintiff's counsel, *Mr. Marbury*, instructed the jury, "that if they believe, from the evidence, that on the 30th of March, 1835, the defendant contracted with the plaintiff to sell to him one thousand barrels of flour at \$4.75 per barrel, to be delivered, half on the 20th and the residue on the 30th of April thereafter, and that the plaintiff, in the presence of the defendant, and with the intent to reduce the terms of the said contract to writing, made an entry in his book, in the words following," (as before stated) "and read the same to the said defendant, who assented to the correctness of the said entry; and that the said defendant afterwards addressed letters to the plaintiff, signed by him, referring to the said contract;" (see the letters of the defendant to the plaintiff, of the 6th of April and 7th of May, 1835, as above recited,) "it is competent for the jury to connect the said letters with the written entry; and the same, taken together, constitute legal and valid evidence of a written contract in conformity with the requisitions of the statute of frauds.

CRANCH, C. J., stated his opinion to be that the case was within the statute of frauds and perjuries. The plaintiff's memorandum in his book is not signed by any one, and the defendant's assent to it is only proved by oral testimony; so that, without the letters, the case is clearly within the statute. The letters do not contain

the whole contract, nor do they refer to the written memorandum in the plaintiff's book; with which the letters cannot be connected without parol testimony. 2 Kent's Com. 511.

The COURT further instructed the jury, at the prayer of the plaintiff's counsel, that if they believed, from the evidence, that the defendant, residing and carrying on the business of a miller, at Williamsport, in the State of Maryland, contracted, on the 30th of March, 1835, to sell to the plaintiff one thousand barrels of flour, at \$4.75 per barrel, and to deliver the same at Georgetown, on the 20th and 30th April next thereafter; and that afterwards, at the request of the defendant, and in consequence of a breach or breaches in the canal, the plaintiff agreed to extend the time for the delivery of the said flour, to the 5th and 15th day of May next thereafter, and that the defendant neglected and refused to deliver the said flour at the said last-mentioned times, then the plaintiff is entitled to recover in this action, although the jury should believe that the navigation of the said canal was much obstructed during the spring of the year 1835, and the defendant was put to inconvenience and difficulty in executing his said contract by reason thereof."

CRANCH, C. J., observed that, as the Court had overruled his opinion that the evidence was not sufficient to take the case out of the statute of frauds, he concurred in the present instruction.

The defendant's counsel, *Mr. R. J. Brent*, then prayed the Court to instruct the jury, "that if they believe, from the evidence, that the whole of the one thousand barrels of flour, or any part thereof, was (*Qu.?* not) on hand at the time of entering into the alleged contract, then the entire contract is void, and the plaintiff is not entitled to recover."

Which instruction the Court refused to give.

Whereupon the defendant's counsel further prayed the Court to instruct the jury, "that if they believe that Davidson and Dodge were parties in the original, or any substituted, contract, then the plaintiff is not entitled to recover."

Which instruction the Court also refused to give.

The defendant's counsel then moved the Court to instruct the jury, that there is no evidence of a contract to deliver five hundred barrels of flour on the 5th, and five hundred on the 15th of May, as charged in the declaration.

Which instruction the Court (*THRUSTON, J., contra*,) also refused to give. CRANCH, C. J., concurred in this refusal; his opinion in respect to the statute of frauds having been overruled by the Court, as aforesaid.

To these refusals of the Court to instruct the jury, as prayed by the defendant's counsel, and to the instructions given at the prayer of the plaintiff's counsel, the defendant took a bill of

exceptions. The jury found a verdict, in favor of the plaintiff, \$681.25. The defendant took a bill of exceptions, and, it is understood, applied to one of the justices of the Supreme Court for a writ of error, (which he could not have, as a matter of right, because the verdict was for less than \$1,000,) but the justice refused to award it.

JAMES MOORE v. JOHN WATERS.

A justice of the peace may have jurisdiction of a matter, incidentally, of which he would not, if it were the principal cause of action; therefore he may have jurisdiction in an action of debt upon a bond, in the penalty of fifty dollars, conditioned that if a certain bay mare should be proved not to be the property of J. B., the bond should be in full force, otherwise, void; and thus collaterally try the title to the mare.

REPLEVIN of the plaintiff's property, taken by the defendant, who was a constable, under and by virtue of a *feri facias* issued by a justice of the peace upon a judgment, by him rendered, in an action of debt upon a bond, in the penalty of fifty dollars, the condition of which was that if a certain bay mare (described therein,) should be thereafter legally proven not to be the property of James Brown, then the bond to be in full force; otherwise, void.

Mr. Brent, for the plaintiff, contended that the justice had no jurisdiction to try the title to the mare, which was the only matter tried by the justice.

Mr. Bradley, contra. The cause of action is a debt of fifty dollars; this is within the jurisdiction of the justice, and he cannot be ousted of that jurisdiction by reason of any collateral matter which may come in question, incidentally, upon the trial.

The COURT (MORSELL, J., doubting,) was of opinion that the justice had jurisdiction of the cause. The bond was a contract to pay \$50, upon a certain event. Whether that event had or had not occurred, was a question incidental to the question whether the debt was due or not. If the justice admitted improper evidence, it was error, but could not oust him of jurisdiction.

Verdict for defendant.

WILLIAM JOHNSON v. FREDERICK DAWS.

In an action for maliciously causing the plaintiff to be arrested, it is no defence that the defendant's oath did not, in law, authorize the magistrate to grant the warrant, if the defendant availed himself of it and delivered it to the constable to be executed, unless the oath and arrest were made ignorantly, and without malice.

ACTION UPON THE CASE, for maliciously causing the plaintiff to

be arrested and imprisoned for ten days, without probable cause, upon a charge of felony.

It appeared, in evidence, that Mr. Coote, a justice of the peace, issued his warrant, reciting that it appeared to him, by the information and oath of Frederick Daws, the defendant, that his property, namely, three mares, had, within two days last past, strayed from the commons of the city of Washington, or been feloniously stolen, taken, and carried away out of the city of Washington; and that the said Frederick Daws had probable cause to suspect, and did suspect, that the said mares were confined in the premises of a certain William Johnson, (the plaintiff,) in the said county; therefore, the constable, Madison Jeffers, was thereby required, with proper assistance, to enter, in the day-time, into the said premises of the said William Johnson, and there diligently search for the said mares; and if the same or any part thereof should be found, upon such search, to bring the said mares so found, and also the body of the said William Johnson, before the said justice or some other justice of the peace of the said county, to be disposed of and dealt with according to law.

The warrant was executed, and the plaintiff arrested on the 3d of October, 1835. It appeared, also, that the case was dismissed by the justice, with the consent of the complainant, (the present defendant,) on the 13th of October, 1835. This suit was commenced on the 17th of the same month.

The warrant, when issued, was delivered to the constable, and the defendant went with him to show and identify the mares.

Mr. Bradley, for the defendant, prayed the Court to instruct the jury, that the oath, as stated in the warrant, did not authorize the justice to issue it; and therefore the defendant is not liable.

Which instruction the Court (THRUSTON, J., doubting,) refused to give; but, upon the prayer of *Mr. Bradley*, (the defendant's counsel,)

The Court (*nem. con.*) instructed the jury, that if, from the evidence, they should be of opinion that the defendant's horses strayed, or were stolen, from the commons of the city of Washington; that they were found by him on the premises of the plaintiff, and by him there confined; that the defendant demanded them, and the plaintiff refused to deliver them; that thereupon the plaintiff applied to the justice of the peace for advice and direction to regain his said property, by a civil remedy; that the justice advised him to make the affidavit; and that, thereupon, he did make the affidavit upon which the warrant was issued, under which the horses were retaken and delivered to the defendant; and the defendant, upon being called upon, said he did not mean, and never did mean, to prosecute the plaintiff

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criminally, then the plaintiff is not entitled to recover in this action. See *Cohen v. Morgan*, 6 D. & R. 8; 1 Har. Dig. 295, S. C.

Verdict for plaintiff, \$25.

Motion in arrest of judgment, and for a new trial, refused.

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RAPHAEL SEMMES *et al.* v. WILLIAM WILSON.

The jury cannot infer that the plaintiffs agreed to run the risk of a note's being a forgery, because it was passed to them long after it was dishonored, and at a discount of 10 per cent. and interest less than its nominal amount.

A person who sells a note, is always understood as affirming that it is what it purports to be, namely, a genuine note.

If it is not what it purports to be, it is nothing, and may be treated as a nullity; and it is not material whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered; or to be sold and delivered at a subsequent day.

In the first case, it would be no payment; in the second and third cases, there would be a total failure of the consideration; and the person who has parted with his property, in expectation of a consideration, which has failed, may resort to his original cause of action.

To enable a plaintiff, who has received from his debtor a forged note, in payment of a precedent debt, to recover upon his original cause of action, it is not necessary for the plaintiff to prove that the defendant knew that the note was forged, when he passed it to the plaintiff, or that he passed it fraudulently.

It is only necessary for him to prove that the note was forged, and was passed to him by the defendant, for a valuable consideration, after it was dishonored.

It is not necessary that the plaintiff should prove, that he had instituted suits against the maker and indorser of the note, and failed to recover in such suits.

He has a right to establish the forgery in a suit directly against the party who passed the note to him.

If the innocent *bonâ fide* holder of a forged note, which he has received for a valuable consideration, passes it to another innocent person, *bonâ fide*, and for a valuable consideration, without indorsing it; although not liable upon the note, he is liable for the amount he has received for it, provided the other party has not been guilty of such negligence as would deprive the person from whom he received the note, of his remedy against prior parties who might be liable to him, and has given notice and offered to return the forged paper in a reasonable time.

The person, who passes away a forged note which has laid a long time dishonored in his hands, is not wholly free from blame in not having discovered the forgery; and on that ground may be liable to refund to the person to whom he passed it, the consideration which he received.

ASSUMPSIT, for lumber, sold and delivered. The evidence was, that the defendant, in payment of a debt, due to him, received a note purporting to be made by one W. Lancaster, dated February 9, 1833, for \$150, at 60 days, payable to and indorsed by one Eleanor Gardiner in blank; and due on the 10th – 13th of April, 1833. The defendant indorsed it in blank, and put it into a bank for collection. It was not paid at maturity, and the defendant withdrew it from bank, erased his indorsement, and offered it to the plaintiffs for \$136.75, payable in lumber. The plaintiffs

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accepted the offer, received the note, and gave the defendant the following due-bill:

"Due William Wilson \$136.75, payable in lumber.

"\$136.75.

SHEPARD AND MUDD.

"May 27, 1833."

Lumber to the amount of \$179.94, was delivered by the plaintiffs to the defendant, from time to time, as he wanted it, commencing on the 28th of May, and ending on the 4th of October, 1833.

On the 4th of January, 1834, the account was settled by crediting the defendant \$136.75 for the note, and \$43.19 in cash for the balance.

It was afterwards discovered that the note was a forgery; the names of the maker and first indorser being forged.

The defendant was ignorant of the forgery when he passed it to the plaintiffs, although it had then been dishonored, and had laid over, at least, forty-four days. It did not appear that the note had been protested.

Upon the trial, *Mr. Bradley*, for the defendant, prayed the Court to instruct the jury

That if, from the evidence, they should be of opinion that the note was sold by the defendant to the plaintiffs, long after it became due, at ten per cent. and the interest less than the real amount of the note, then it is competent for them to infer that the said discount was intended to cover all risks upon the note, including the risk of its being forged.

Which instruction the COURT (*nem. con.*) refused to give.

The defendant's counsel then prayed an instruction to the jury, that unless they should believe, from the evidence, that the said note was a forged note, and that the forgery was known to the defendant when he passed it to the plaintiffs, and not known to the plaintiffs; and that so knowing the same, the defendant fraudulently passed the said note to the plaintiffs, after the same had been due and unpaid for the space of nine months and upwards; and the plaintiffs paid him the sum of \$136.75, being the amount due, after deducting the interest and ten per cent. on the gross amount of the note, then the plaintiffs are not entitled to recover.

Which instruction, the COURT, also, (*nem. con.*) refused to give.

The counsel for the defendant, then prayed the Court to instruct the jury, that the plaintiff is not entitled to recover in this action, unless the jury shall be satisfied by the evidence, that suits were instituted by the present plaintiffs against the drawer and indorser of the said note; and that, in such suits, the plaintiffs failed to recover.

Which instruction, the COURT (*THRUSTON, J., contra*,) refused to give.

The verdict being for the plaintiff, the defendant's counsel moved the Court for a new trial, and assigned the following reasons :

1. Because the Court misdirected the jury upon the questions of law submitted to them on the part of the defendant.

2. Because the Court permitted testimony to go to the jury, after the same had been objected to by the defendant, to prove the forgery of the names of the maker and indorser of the promissory note offered in evidence by the plaintiffs.

3. Because the Court permitted the said promissory note to be given in evidence to the jury.

4. Because the verdict was against the law, and against the evidence.

CRANCH, C. J., delivered the opinion of the Court (THRUSTON, J., absent,) as follows :

The first prayer required the Court to instruct the jury that they may infer that the plaintiffs agreed to run the risk of the note's being a forgery, because it was passed to them long after it was dishonored, and at ten per cent. (and interest) less than its nominal amount; and in refusing that instruction, it is said the Court erred.

When a person sells a note he is always understood as affirming that it is what it purports to be; that is, that it is a genuine note. If it is not what it purports to be it is nothing, and may be treated as a nullity; and it is not material whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered, or to be sold and delivered at a subsequent day. In the first case it would be no payment; in the second and third cases there would be a total failure of the consideration; and the party who has parted with his property in expectation of a consideration which has failed, may resort to his original cause of action.

A deduction of ten per cent. and interest upon a dishonored note, not indorsed by the party who offers it for sale, would only justify an inference that the party who purchased it had agreed to take the risk of the responsibility of the parties whose names appear upon the note. No one who purchases a note ever thinks of taking upon himself the risk of its being a forgery; nor does he ask the vendor whether it is, as it purports to be, a genuine note. The question, among merchants, would be deemed an insult. It would imply that the vendor knew whether it was or not a forgery; and that if it was, he must be a knave to offer it. He must be considered, therefore, as offering it as a genuine note; and ten per cent. is a moderate discount upon a dishonored note, even if it be a genuine note of solvent parties.

The longer the note remained in the hands of the defendant after it was dishonored, the greater right had the plaintiffs to suppose it to be a genuine note ; for it would be reasonable to infer that the defendant would inquire why the note was not paid at maturity ; and that if it were not genuine, the forgery would have been discovered.

The plaintiff could not suppose that the defendant intended to sell him a counterfeited or a forged note ; and as the defendant had had time to discover the forgery, if it was one, the plaintiff must have had full confidence in the genuineness of the note.

Neither the length of time since the note became payable, nor the rate of discount, would have justified the jury in inferring that the plaintiffs took on themselves the risk of the note being forged. The plaintiff was not put upon inquiry, by the defendant, as to the genuineness of the note ; on the contrary, the length of time that it remained in the hands of the defendant, after it was dishonored, tended to lull him into security upon that point.

We think, therefore, that the first instruction prayed by the defendant, was correctly refused.

The second instruction prayed by the defendant's counsel was, that the plaintiffs were not entitled to recover "unless the jury should believe, from the evidence, that the said note was a forged note ; and that such forgery was known to the defendant at the time he passed it to the plaintiffs, and not known to the said plaintiffs, and that so knowing the same, the defendant fraudulently passed the said note to the plaintiffs after the same had been due and unpaid for the space of nine months and upwards, and that the plaintiffs paid him the sum of \$136.75, being the amount due, after deducting the interest and ten per cent. on the gross amount of said note."

This instruction was refused by the Court, because they were of opinion that it was not necessary to the plaintiffs' right of action, in this case, that they should prove any of the facts stated in this second prayer, other than that the note was a forged note, and passed, by the defendant, to the plaintiffs for a valuable consideration after it was dishonored. There was no evidence that nine months had elapsed, after the dishonor of the note before it was passed to the plaintiffs. The note fell due on the 10th - 13th of April, and it appears from the due-bill given by the plaintiffs to the defendant for lumber, that it was passed to the plaintiffs on the 27th of May, forty-four days after it fell due.

The Court, however, do not deem the length of time material ; except, that the longer it was the less excuse had the defendant for not having discovered the forgery.

The Court is still of the opinion that the plaintiffs' right to

recover in this action, does not depend upon their proving fraud in the defendant, and that this second instruction was properly refused.

The third instruction prayed by the defendant's counsel, was, "that the plaintiffs are not entitled to recover in this action unless the jury shall be satisfied, by the evidence, that suits were instituted by the present plaintiffs against the drawer and indorser of the said note, and that in such suits the plaintiffs failed to recover."

Among the cases cited, and many others which have been examined, where suits have been brought to recover money paid upon forged instruments, not one has been found to support the doctrine contained in this prayer. In all of them the forgery has been primarily and directly proved, or attempted to be proved, in the action against the party who passed the forged paper to the plaintiff; and no intimation or suggestion that there should be a suit first brought against the parties whose names were forged.

We think this instruction also was correctly refused; and that the plaintiffs had a right to give the note in evidence, and to prove the forgery in this action. The specific grounds alleged for a new trial are, therefore, overruled.

But there is a general allegation that the verdict was against law and evidence.

The whole evidence is not stated, but we believe the facts which it tended to prove were as before mentioned. It did not appear at what time the plaintiffs first discovered the forgery, nor when they first gave notice of it to the defendant.

It seems to be well settled by the cases which have been cited and examined, that if the innocent, *bonâ fide*, holder of a forged note which he has received for a valuable consideration, passes it to another innocent person, *bonâ fide*, and for a valuable consideration, without indorsing it, although not liable upon the note, he is liable for the amount he has received for it, provided the other party has not been guilty of such negligence as would deprive the person, from whom he received the note, of his remedy against prior parties who might be liable to him, and has given notice, and offered to return the forged paper in a reasonable time. See *Jones v. Ride*, 5 Taunt. 488; *Wilkinson v. Johnson*, 3 B. & C. 428; S. C. 5 D. & R. 403; *Fuller v. Smith*, 1 Ryan & Moody, 49; S. C. 1 Carrington & Payne, 197; Chitty on Contracts, 191, who cites the above cases; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Markle v. Hatfield*, 2 Johns. 455; *Young v. Adams*, 6 Mass. 182; *Smith v. Chester*, 1 T. R. 654; *Price v. Neal*, 3 Bur. 1354; *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 Id. 64; *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333.

In *Wilkinson v. Johnson*, 5 D. & R. 411, the court said, "And though, where all the negligence is all on one side, it may, perhaps, be unfit to inquire into the quantity, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other party; at least, if the mistake is discovered before any alteration in the situation of any of the other parties; that is, while the remedies of all the other parties entitled to remedy are left entire, and no one is discharged by *laches*." "We think the payment in this case was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money."

In the case of *Fuller v. Smith*, 1 Ryan & Moody, 49, Abbot, C. J., said: "If you take a bill without indorsement, you cannot sue the person from whom you receive it," (meaning, no doubt, upon the bill) "but then you take it as a bill; but here, in fact, the instrument, on the faith of which the money was advanced, turns out not to be a bill of exchange as it was represented, being altogether a forgery; and that I take to be the distinction."

Chitty, (on Contracts, 191,) says: "A person who discounts a forged navy-bill, bank-note, or similar instrument, for another who passed it to him without knowledge of the forgery, may recover back the money as paid by mistake. In such case also there is a failure of the consideration." He cites the cases from 5 Taunt. 488; 1 Ryan & Moody, 49; 3 B. & C. 428; 6 Taunt. 76; 3 Burr. 1354.

In the case of the *Bank of the United States v. The Bank of Georgia*, 10 Wheat. 344, Mr. Justice Story says: "Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification ingrafted on the general doctrine, that the notice and the return must be in reasonable time, and any neglect will absolve the payee from responsibility."

In the case of *The Gloucester Bank v. The Salem Bank*, the plaintiffs had received forged notes purporting to be notes of their own bank, and paid them; and, fifteen days afterwards, gave notice to the defendants from whom they had received them, and then brought suit to recover back the money.

Parker, C. J., said, "The true rule is that the party receiving such notes" (forged bank-notes) "must examine them as soon as he has opportunity and return them immediately; if he does not he is negligent; and negligence will defeat his right of action."

"This principle will apply in all cases when forged notes have been received; but certainly with more strength when the party receiving them is the one purporting to be bound to pay; for he

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knows, better than any other, whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

In the present case, it has been before observed that it does not appear when the forgery was first discovered, nor at what time the plaintiffs gave notice of the forgery to the defendant.

If the plaintiffs kept the note a long time without inquiry, it may have been that they were lulled into security by the defendants having kept the note so long after it was dishonored; and if there was negligence on their part, there was at least as much (we think more) on the part of the defendant. And we should say, with the Court of King's Bench in *Wilkinson v. Johnson*, (5 D. & R. 411,) "We think the payment," by the plaintiffs, "in this case, was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money."

We think, therefore, the motion for a new trial must be overruled.

Judgment for the plaintiff.

JOHN B. NEVETT v. WASHINGTON BERRY.

In an action of trover for negroes, the plaintiff may give evidence of, and recover, damages beyond the value of the property converted.

If the vendor states, under his seal, that he has bargained, sold, and delivered the property to the vendee, the vendor in an action of trover by the vendee for the property, is estopped to deny the delivery; and such an instrument is evidence of property in the vendee at the time of the conversion. If, after the conversion, the parties enter into a new contract respecting a part of the property, which is thereupon delivered to the vendee, such new contract and delivery are not evidence of the performance of the first contract on the part of the vendor; nor of relinquishment of damages for such conversion; unless the vendee received such portion of the property as a compliance with the original contract, and intended by so receiving it to relinquish his claim for damages for the previous conversion.

TROVER for forty-nine slaves, sold by the defendant to the plaintiff, by the following bill of sale:

"For and in consideration of one dollar to me in hand paid, the receipt of which I hereby acknowledge, and the further sum of eighteen thousand seven hundred and seventy-four dollars to be to me well and truly paid on or before the first day of November next, I have bargained, sold, and delivered to John B. Nevett of Mississippi, (planter,) the following negro slaves, to wit, Jo, Winson, Shedrack," (&c. &c., naming forty-nine slaves,) "and all their children under three years and six months of age, they

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being, in part, all the negroes now residing on my estate, formerly owned by the late Rinaldo Johnson ; which said negroes I warrant sound in body and mind, and slaves for life, with the exception of Rachel, whom I only warrant a slave for ten years from this date. I further agree to deduct out of the moneys to be paid me on the first of November as above, the price of any of said negro or negroes which may die before that time. In witness, I have put my hand and seal, this twenty-fourth day of June, in the year of our Lord 1835. Washington Berry." [SEAL.]

On the trial, *Mr. R. S. Coxe*, for the plaintiff, offered to give evidence of damage incurred by the plaintiff upon the faith of the sale ; such as the charter of a vessel to carry the negroes to the South, demurrage, &c.

Mr. Brent, for the defendant, objected that such damages cannot be given in evidence in trover.

The COURT, however, (*THRUSTON, J., contra*,) permitted the evidence to be given.

Mr. Brent then objected that the contract was executory, and did not pass the title ; and that the negroes had never been delivered to the plaintiff, and that it appears by the contract that they were not to be delivered until November ; so that neither the title nor the right of possession was ever in the plaintiff. *Jackson v. Clark*, 3 Johns. 424.

Mr. Coxe, contra. The defendant, by the bill of sale, under his seal, has solemnly acknowledged that he had " bargained, sold, and delivered," the negroes, and he cannot now deny it. The money was to be paid on the first of November, but the sale and delivery were complete on the 24th of June.

The COURT (*nem. con.*) was of opinion that the defendant could not deny the delivery, having solemnly acknowledged it by his deed ; that the payment was a matter of mutual, but not dependent, covenant ; that the sale was complete, and the property and possession vested in the plaintiff.

Mr. Brent, for the defendant, prayed the Court to instruct the jury that, if they believe from the evidence, that the defendant contracted to sell, and did sell to the plaintiff sundry negroes, and afterwards refused to comply with his said contract, and that while the negroes were yet in the possession of the defendant, he applied to the plaintiff to withdraw from the said sale several of the said negroes, at the prices to be paid for the same by the terms of the original contract, and that the plaintiff did agree to the said proposition ; and that the defendant did deliver to the plaintiff, and the plaintiff did accept the residue of the said negroes, and pay for the same according to the terms of the said original contract ; then the said original contract has been per-

Bradley v. Eliot.

formed so far as the plaintiff has not agreed to rescind the same, and the plaintiff is not entitled to recover in this action.

But the COURT (*nem. con.*) refused to give the instruction.

Mr. Coxe, for the plaintiff, then prayed the Court to instruct the jury, that the contract executed by the defendant under date of the 24th of June, 1835, given in evidence by the plaintiff, in law amounted to an actual sale of the negroes therein mentioned, and they became the property of the plaintiff. And if the jury should believe, from the aforesaid evidence, that the plaintiff did on or about the 5th of November, 1835, demand the delivery of the said negroes, which the defendant refused to deliver, but retained possession of the same against the will and assent of the plaintiff, such refusal to comply with such demand is sufficient evidence from which the jury may and ought to find the defendant guilty of the conversion charged in the declaration; and the evidence of the subsequent delivery, by the defendant, of the said negroes, or some of them, can only operate to mitigate the damages which the plaintiff is entitled to recover; and that if the jury shall believe from the said evidence that the plaintiff did not accept the said delivery as a compliance with the said original contract, and intend thereby to relinquish his claim for damages sustained by such illegal detention by the defendant, the acceptance, if proved, does not amount to a release of said damages.

Which instruction the COURT gave, (*nem. con.*)

Mr. Brent then prayed the Court to instruct the jury that the plaintiff could not in law recover in damages more than the value of the negroes at the time of the conversion.

But the COURT (*nem. con.*) refused.

Verdict for the plaintiff, \$750.

W. A. BRADLEY, use of E. B. Caldwell, use Bank of Washington, v. SAMUEL ELIOT, JR.

If, after judgment, an entry be made on the clerk's docket, intimating that the judgment is for the use of a third person, the Court will not interfere to order it to be stricken out, after the term in which the judgment was rendered.

AN action was entered at April term, 1821, in the name of W. A. Bradley, for the use of E. B. Caldwell against Samuel Eliot, Jr., who confessed judgment at the return term of the writ.

On the 17th of December, 1835, the clerk wrote in the margin these words: "Use of the Bank of Washington, says J. Hellen, Esq., 17th December, 1835."

Mr. R. S. Coxe, for the plaintiff, moved the Court to order

those words to be stricken out or erased from the docket, they having been written without the authority of the Court.

The COURT (THRUSTON, J., absent,) refused to interfere, and discharged the rule.

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LESSEE OF THE BANK OF THE UNITED STATES v. JOHN P. VAN
NESS AND WILLIAM JONES.

On the 26th of October, 1801, after Congress had, by the Act of the 27th of February, 1801, exercised exclusive legislation over the District of Columbia, the chancellor of Maryland had jurisdiction to decree a conveyance, by an infant, of lands in that district, in pursuance of a contract made by the ancestor of the infant; the suit, for a specific performance, having been commenced before Congress had exercised such exclusive legislation.

The chancellor of Maryland, on the 26th of October, 1801, decreed that the infant, Marcia Burns, should, in a certain event, by W. M. D., her guardian *ad litem*, convey to J. P. V., the purchaser, the property in question.

Upon the happening of the event, a deed, purporting to be from the infant by her guardian, and concluding thus: "In witness whereof the said Marcia," (the infant,) by W. M. D., her guardian in this case, hath hereunto set her hand and seal the day and year before mentioned," was signed by the said W. M. D., "guardian of the said Marcia Burns," and sealed with his seal. The commissioner who took the acknowledgment certified that the said W. M. D. acknowledged the instrument to be "his act and deed as guardian as aforesaid, and thereby the act and deed of the said Marcia."

Held, that this deed, thus signed, sealed, delivered, acknowledged, and duly recorded, was a good and sufficient execution of the decree; and a good deed to pass the title to the purchaser; and that if it be not, yet by the Act of Maryland of 1785, c. 72, § 14, the decree itself stands as a conveyance.

EJECTMENT, for lots 6 and 7 in the square 226 in the city of Washington.

Upon the trial the plaintiffs offered in evidence an exemplification of the record of the proceedings and decree of the chancellor of Maryland in a suit by *Isaac Pollock v. Marcia Burns*, the infant heir at law of David Burns, deceased, for the specific execution of a contract entered into, in writing, in the lifetime of the said David Burns, for the sale of sundry house lots in the city of Washington to the said Isaac Pollock; in which suit, which was commenced on the 17th of May, 1800, the chancellor, on the 1st of November, 1800, decreed that upon the complainant's securing to the satisfaction of the chancellor the sum of £10,471 18s. 1d., to be paid on the 17th of April, 1804, with interest annually, the defendant, by W. M. D., her guardian, should convey to the complainant, Isaac Pollock, in fee, certain lots in Washington, particularly described in the decree, and including the lots now in controversy.

On the 15th of May, 1801, the complainant, Pollock, filed a petition for a commission to certain persons to value certain lands,

which he offered to mortgage as security for the purchase-money ; which commission was issued on the 26th of May, 1801, and returned on the 21st of October, 1801.

On the 26th of October, 1801, the chancellor, being satisfied of the sufficiency of the security offered, decreed, with consent of all the parties, that, upon the complainant's executing the mortgages, and paying up the interest, "the defendant, Marcia Burns, by William Mayne Duncauson, her guardian, shall execute a conveyance to the complainant, Isaac Pollock, and his heirs, as directed by the decree in this cause, passed on the first day of November last."

On the 12th of January, 1802, a deed was executed by the guardian, William M. Duncauson, to Pollock, of the lots mentioned in the decree. It purported to be a deed from Marcia Burns, by her guardian, W. M. D., to Isaac Pollock, in fee, and recited the substance of the proceedings and decree ; and averred that the security had been approved, the mortgages duly executed, and the interest paid up. It concluded thus : "In witness whereof the said Marcia Burns, by William M. Duncauson, her guardian in this case, hath hereunto set her hand and seal the day and year above written." It was signed "William M. Duncauson, guardian of Marcia Burns," and was sealed.

The commissioner, Alexander White, Esq., who took the acknowledgment, certified that said William M. Duncauson, guardian of Marcia Burns, as aforesaid, acknowledged the instrument to be "his act and deed as guardian as aforesaid, and thereby the act and deed of the said Marcia." The deed was duly recorded.

The plaintiffs claimed title under this deed.

The defendant's counsel, *Mr. Marbury* and *Mr. R. S. Cox*, objected to the admission in evidence of the record of the proceedings and decree in the case of *Pollock v. Burns* ; and contended that after the 27th of February, 1801, when Congress began to exercise exclusive legislation over the district, the Chancellor of Maryland could not pass any decree which should affect lands in the district. That although the suit was commenced before this part of the district was completely severed from the State of Maryland, yet no decree, passed after that separation, could be executed here, except in the manner provided in the 13th section of the Act of the 27th February, 1801, "concerning the District of Columbia," namely, by execution issuing from this Court upon an exemplification of the record of the proceedings in the suit in the Court of Chancery of Maryland. That the decree could not operate here *proprio vigore*.

The deed from Duncauson to Pollock was also objected to, on

the ground that the guardian's authority had ceased by the transfer of the jurisdiction from the State of Maryland to the United States; for the same reason that letters of administration taken out in Maryland before the separation, did not authorize the administrator to sue in this Court after the separation. *Sears v. Fenwick*, 1 Cranch, 259.

It was also contended, that the deed was not executed in the name of the infant, Marcia Burns, but in Duncauson's own name; he signed his own name only, and affixed his own seal only, and acknowledged it to be his own deed only, — not the deed of the infant. An attorney who executes and acknowledges a deed for his principal, must execute and acknowledge it in the name of his principal, not in his own name for his principal. *Clarke v. Courtney*, 5 Peters, 320.

Mr. Redin, contra, cited the Maryland Act of 1773, c. 7, § 1, by which it is enacted that "persons under age," "seized of any lands," &c., "bound by an agreement to convey;" "on a suit for specific performance or execution of such agreement, shall, by direction of the court of chancery," "convey and assure any such lands," &c., "in such manner as the Court shall, by such order, direct, to any other person or persons; and such conveyances and assurances shall be as good in law as if such infant" "were of age."

He cited also the Maryland Act of October, 1778, c. 22, § 2, by which it is enacted that infants, in such cases, shall "be bound and concluded by any deed or deeds, conveyance or conveyances, assurance or assurances, made by their guardian or guardians, (to be appointed by the said Court,) in pursuance of the order of the Court of Chancery, and such deed," &c., "so made, shall be as good and effectual in law, as if such infant or infants were, at the time of making thereof, of full age, and had executed the same."

The COURT (*nem. con.*) overruled the objections, being of opinion that the Court of Chancery of Maryland had jurisdiction and authority to pass the decree of the 26th of October, 1801.

The COURT, also, (CRANCH, C. J., doubting,) was of opinion, that the deed of the 12th of January, 1802, made by the guardian, was a good execution of the decree, and passed the legal title to Pollock.

The COURT was also of opinion, (*nem. con.*) that if that deed did not convey the legal title of the lots to Pollock, the decree itself, under the Maryland Act of 1785, c. 72, § 14, stands as a conveyance, and passed the title.

One of the demises laid in the declaration was by the heirs of Benjamin Stoddert, under which the plaintiff offered in evidence

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two deeds from Isaac Pollock to Charles Lowndes; one from Charles Lowndes to Walter Smith, in trust, and one from Walter Smith to Benjamin Stoddert. To the admission of which deeds the defendant objected, on the ground that the last-mentioned deed was not made in conformity with the terms of the trust.

But the COURT (*nem. con.*) overruled the objection, and the deeds were read in evidence.

The verdict was for the plaintiffs.

The defendants took their bills of exception, and carried the cause to the Supreme Court, where the judgment was affirmed on the 22d of January, 1839.

W. A. BRADLEY v. CHARLES KNOX AND REDDICK MCKEE.

An action at law will not lie by an indorsee against a remote indorser of a promissory note, made and indorsed in Virginia, although made payable at the North-West Bank of Virginia, by whose charter, notes "made negotiable" at that bank, are put upon the footing of bills of exchange; and although it should be put in circulation as a negotiable instrument, and deposited in the bank for collection, before it became payable; and should be regularly protested, and regular notice given to the parties.

An intermediate indorser of such a note is, therefore, a competent witness to invalidate the note.

The rule, that a party to an instrument shall not be permitted to discredit it by his testimony, is applicable only to mercantile negotiable paper, which a promissory note, made and indorsed in Virginia, is not.

ASSUMPSIT, by an indorsee against a remote indorser of a promissory note, made by Reddick McKee, agent of The Wheeling Cotton Manufacturing Company, dated at Wheeling, March 22, 1834, at 60 days, for \$4,000, payable to the order of Richard Simmes at the North-West Bank of Virginia, without defalcation, for value received, and signed "R. McKee, agent Wheeling Cotton Manufacturing Company." Indorsed by Richard Simmes, Knox & McKee, M. Nelson, and W. B. Atterbury. The note was regularly demanded, and protested, and due notice given to the defendants.

The defendant, McKee, was taken; but the other defendant, Knox, was not.

Upon the trial of the issue against McKee, *Messrs. Brent & Brent*, counsel for the defendant, moved the Court to instruct the jury, "that if they shall believe, from the evidence, that the note was made and indorsed by the defendant, in the State of Virginia, and was made payable at the North-Western Bank of Virginia, in the said State, then the plaintiff is not entitled to recover in this action against the defendant as indorser of the said note."

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Which instruction the COURT (THRUSTON, J., not sitting in the cause,) gave; it appearing that there were several intermediate indorsers between the plaintiff and the defendant. (See 5 Rand. 40, 45; Id. 335, and 4 Leigh, 116; and see also the charter of that bank in 1817, by which, notes, "made negotiable" at that bank, are put upon the footing of bills of exchange.)

Mr. Bradley, for the plaintiff, then moved the Court to instruct the jury, that if, from the evidence, they should be of opinion, that the said note was made payable at the North-Western Bank of Virginia, and put into circulation as a negotiable instrument; and that it was deposited in the said bank before it became due, and was given to take up and renew, and used to take up and renew a note for a similar amount drawn and indorsed by the same parties, and that when it became due, demand of payment was regularly made at the said bank and refused, and that the said note was regularly protested, and notice thereof given to the indorser, then the plaintiff is entitled to recover.

Verdict for the defendant.

The plaintiff took a bill of exceptions, but has not prosecuted a writ of error.

W. A. BRADLEY v. REDDICK MCKEE.

The proceedings of a corporation aggregate may be given in evidence against a party, not a member of the corporation, although there should be no evidence that such notice of the meeting, as the charter requires, had been given.

A promissory note, signed by A. B. as agent of an incorporated manufacturing company, does not, upon the face of it, import a personal obligation; and it is not incumbent on the defendant to show his authority to make such a note; nor the extent of his powers; nor that the money was applied to the use of the company; nor that he declared it was for their use; the burden of proof, in such case, is upon the plaintiff.

If, at the date of the note, or at the time it became payable, the company had ceased to do business as a company, the corporation was not thereby dissolved, nor the defendant thereby rendered personally responsible upon the note; and if, after the making of such note, the corporate property was sold by the company, who ceased to do business as a corporation, and the stockholders made a distribution of the effects of the corporation, and apportioned the debts due by the company to be paid by such individual stockholders, the corporation did not thereby cease to exist, but was capable of being bound by such a note.

If it was the usage and custom of the banks and exchange-brokers in that part of the country where the note was made and indorsed, to discount such paper at one per cent. for sixty days, and to charge an additional premium of from a half of one per cent. to one per cent. for exchange on Eastern paper, when such paper was loaned, and to charge the like discount and premium for the renewal of the notes given therefor; such a transaction, if *bonâ fide* and not intended as a cloak for usury, is not usurious.

Whether the transaction was *bonâ fide*, and not intended as a cloak for usury, is a question of fact to be left to the jury under all the circumstances of the case.

If a note be given by a person, *bonâ fide*, as agent of an incorporated manufacturing

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company, for a loan of money to the company, and the same was known to the person who discounted it, at the time of his discounting it, the agent is not personally liable upon the note.

ASSUMPSIT against the maker of the note mentioned in the preceding case, which was in this form :

“ Wheeling, March 22d, 1834.

“ Sixty days after date, I promise to pay to the order of Richard Simmes, at the North-Western Bank of Virginia, \$4,000, without defalcation, for value received. R. McKEE, Agent

\$4,000. Wheeling Cotton Manufacturing Company.”

Indorsed — Richard Simmes, Knox & McKee, M. Nelson, W. B. Atterbury.

Upon the trial, *Mr. Brent*, for the defendant, contended that he was the regularly appointed agent of the Wheeling Cotton Manufacturing Company, incorporated by the legislature of Virginia, and, as such, authorized to make the note ; that it was made for the company, and legally bound them ; and that it was not his private, individual act. *Rathburn v. Budlong*, 15 Johns. 1.

Mr. Brent offered to read to the jury the minutes of the proceedings of a meeting of the company, (proved by a witness to be such,) at which the defendant was appointed agent.

Mr. Bradley objected that the books of the company are not evidence against a stranger. *Starkie on Ev. Part 2*, page 298. That there was no evidence that ten days' notice of the meeting had been given, as required by the charter.

Mr. Brent, contra, relied upon the opinion of the Supreme Court of the United States, in the case of *The Bank of the United States v. Dandridge*, 12 Wheat. 69 ; that the law “ presumes that every man, in his private and official character, does his duty until the contrary is proved ; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia præsumuntur rite et solemniter esse acta, donec probetur in contrarium*.” “ That persons acting publicly, as officers of the corporation, are to be presumed rightfully in office ; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter,” &c.

The Court overruled the objection, and permitted the evidence to go to the jury.

Mr. Brent, for the defendant, then offered to read to the jury the deposition of M. Nelson.

Mr. Bradley, for the plaintiff, objected that the witness was one of the intermediate indorsers, and could not be permitted to discredit the note which he had indorsed. *Caton v. Lenox*, 5 Rand. 32.

Mr. Brent replied that the rule was only applicable to mercantile negotiable paper, which this Court has just decided this note not to be. *Blagg v. Phenix Insurance Co.* 3 Wash. C. C. Rep. 7. And the plaintiff had cross-examined the witness, and therefore cannot now object to his competency. *Harrison v. Courtald*, 1 Russ. & Milne, 428.

The COURT overruled the objection, and the deposition was read.

Mr. Bradley then contended that the note is not, on its face, a company note, but purports to be the individual note of the defendant; and that the burden of proof is on him to show his authority to bind the company by such a note. *White v. Skinner*, 13 Johns. 308, 311; *Randall v. Van Vechten*, 19 Id. 60.

Mr. Brent, contra. The plaintiff produces a note signed by the defendant, as agent of the company, and the defendant proves that he was their agent; the burden of proof is now on the plaintiff to show that the defendant is personally liable. *Theobald on Agency*, 333; *Wyman v. Gray*, 7 Har. & Johns. 409; 2 Kent, Com. 614.

Whereupon, *Mr. Bradley*, for the plaintiff, moved the Court to instruct the jury that the note upon which this suit is brought imports, upon its face, a personal obligation, and the defendant is personally liable therefor, unless they shall find, from the evidence, that the defendant was authorized to bind the Wheeling Cotton Manufacturing Company by such contract, declared their names, and professed to act for them in the execution of it; and signed the same in pursuance and performance of his said authority.

Which instruction the Court refused to give.

Mr. Bradley then further moved the Court to instruct the jury, that the said corporation is but an agent, exercising only delegated authority; that all agents appointed by it must act within the object and scope of the charter of the said company; that the appointment of such sub-agent must be clearly proved, and the extent of his powers, in the particular matter, clearly defined; and if the jury shall be satisfied, by the evidence, that the promissory note, in the declaration mentioned, was given for a loan of money, they must further find that it was for a loan of money to the said company, for its corporate objects, and that the defendant was fully authorized to obtain such loan, and to bind the said company, by his signature to the said note, and declared, or it was understood between the lender and such agent, that it was for the use of the said company; otherwise, the defendant is personally liable.

Which instruction the Court also refused to give.

Mr. Bradley then further moved the Court to instruct the jury, that, if from the evidence they shall be of opinion, that on the 22d day of March, 1834, or at any time before that day, or before the 24th day of May, 1834, the Wheeling Cotton Manufacturing Company had ceased to do business as a company, or had sold all the property of the company, and ceased to do business as a company or corporation, then the said corporation was dissolved, and the defendant is personally and individually responsible on the note upon which this suit is brought.

Which instruction the Court also refused to give.

Mr. Bradley then further moved the Court to instruct the jury, that, if from the evidence they shall find, that, in the summer of 1834, after the making of the said promissory note, the corporate property of the company was all sold by the said company; that the said company ceased to do business as a corporation, and the stockholders therein made a distribution of the effects of the said corporation, and apportioned the debts due by the said company, to be paid by such individual stockholders, then there is nobody *in esse* which can be sued as the principal, or which the defendant, as agent, could make responsible by the signature to the said note, and he, the defendant, is personally responsible therefor.

Which instruction the Court also refused to give.

Mr. Bradley then further moved the Court to instruct the jury, that if from the evidence they shall be of opinion, that, in the years 1833 and 1834, and for a long time before, it was the usage and custom of the banks and exchange-brokers, in that part of the State of Virginia in which the town of Wheeling is, to discount paper at and after the rate of one per cent. for sixty days; and, in addition thereto, to charge a premium for exchange on eastern paper, varying from an half to one per cent. when eastern paper was loaned; and also to charge the same discount and premium for the renewal of the notes given therefor; and that the said transaction was *bonâ fide*, and not intended as a cloak for usury, this case was not usurious.

Mr. Brent, contra, cited *New York Firemen's Insurance Co. v. Ely*, 2 Cowen, 705.

But the Court gave the instruction.

Mr. Bradley then moved the Court to instruct the jury, that, if they shall be of opinion from the evidence that the consideration given for the promissory note upon which this suit is brought, was a loan negotiated by William B. Atterbury to the Wheeling Cotton Manufacturing Company, by Reddick M'Kee, agent thereof, or by any other person acting on behalf of the said company; and that the terms of the said loan were one per cent. for sixty days' discount for forbearance, and one half per cent. for

 Worthington's Lessee v. John and Margaret Etcheson.

exchange on eastern funds; and that such was the usage and custom of the banks and exchange-brokers in that part of the country where the said loan was made, in the years 1833 and 1834; and that the same rate of discount and premium, or commission, was charged upon each renewal of such loans, then the said contract was *bonâ fide*, and not usurious. Comyn on Usury, 133, 134, 135.

Which instruction the Court refused to give.

Mr. Brent, for the defendant, then moved the Court to instruct the jury, that upon the whole evidence the plaintiff is not entitled to recover in this action, even if the defendant had no authority to bind the company.

Which instruction the Court refused to give.

But upon the motion of the defendant's counsel, instructed the jury, that if they believe from the evidence that the note, on which this suit is brought, was given by the defendant *bonâ fide* as agent for the Wheeling Cotton Manufacturing Company, for a loan of money to the said company, and that the same was known to the said Atterbury at the time he discounted the said note, the plaintiff is not entitled to recover in this action. *New York Firemen's Insurance Company v. Ely*, 2 Cowen, 703.

Mr. Brent, for the defendant, cited *Theobald on Agency*, 303, 337; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Harper v. Little*, 2 Greenleaf, 14; 2 Kent's Com. 631.

Mr. Bradley cited 2 Livermore, 247; *Buffum v. Chadwick*, 8 Mass. 103; *Odiorne v. Maxey*, 13 Mass. 178; *Batty v. Carswell*, 2 Johns. 48; *Thatcher v. Dinsmore*, 5 Mass. 299.

Verdict for defendant. The plaintiff took bills of exception, but has not prosecuted a writ of error.

 CHARLES WORTHINGTON'S LESSEE v. JOHN AND MARGARET ETCHESON.

In ejectment, the death of the lessor of the plaintiff cannot be taken advantage of upon the general issue.

To show possession in the lessor of the plaintiff, who was a purchaser at a sale under a decree of foreclosure, it is sufficient to show that the mortgagor was in possession until his death; and a lease for life, made by the mortgagor, is evidence of his possession, although the lease be not recorded.

When the defendant is a disseizor and intruder, he is not entitled to notice to quit. If the tenant for his own life, die, and his heir enter, the heir is a disseizor and intruder.

THE plaintiff was a purchaser of the property at a sale under a decree of foreclosure of a mortgage made by John Threlkeld,

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who had made a lease for life to one Riffle, but the lease was not recorded, and therefore operated only as a lease from year to year, at the will of the parties. Riffle died, and the defendant Margaret was his daughter and heir at law, and upon the death of her father, entered upon the property.

Mr. Redin, for the defendants, contended that the plaintiff could not recover because his lessor, Charles Worthington, is dead.

The COURT, however, said that the death could not be taken advantage of, upon the general issue.

The (COURT, CRANCH, C. J., giving no opinion,) said that in order to show possession in the lessor of the plaintiff, it was sufficient for the plaintiff to show possession in Threlkeld, and his death.

The counsel for the defendants contended that the plaintiff could not recover without showing notice to the defendants to quit; but

The COURT decided that the defendants were to be considered as intruders; and therefore not entitled to such notice.

Verdict for plaintiff.

 NEGRO SALLY MOODY v. AZARIAH FULLER.

An officer of the United States, being the *bonâ fide* owner of a slave in Fortress Munroe, a place within the United States, but not within the jurisdiction of any one of the States, and removing thence with his family to the city of Washington in the District of Columbia, to reside therein, and bringing his slave with him, cannot lawfully sell such slave within three years after such removal and importation; and such slave, by such importation and sale, becomes free.

PETITION FOR FREEDOM.

Mr. Bradley, for the defendant, prayed the Court to instruct the jury that if, from the evidence, they shall be of opinion that Andrew B. McLean was the *bonâ fide* owner of the petitioner, and, while such *bonâ fide* owner, resided as an officer of, and in the employment of the United States, for a series of years, at Fortress Munroe, within the territory of the United States, and not within the limits of any State of this Union, and brought her from the said territory into the District of Columbia, with his family, when he removed here to reside; then, although the jury shall further find that the petitioner was sold within three years after such removal into the said district, she is not entitled to her freedom under such removal and sale, unless they shall further find that such residence at said Fortress Munroe was intended to defeat or avoid the law prohibiting the importation of slaves.

But the COURT (*nem. con.*) refused to give the instruction.

Mr. Dermott, for the petitioner. *Mr. Bradley*, for the defendant.

UNITED STATES v. CHARLES COLUMBUS.

An indictment, charging that the defendant kept "a certain unlawful, disorderly, and ill-governed house," "as a common tavern," "without license," "and kept a common tippling house," and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drunk in and about the house at all times both at day and night and on Sundays; and permitted certain idle and ill-disposed persons to assemble and continue drinking and tippling, to the common nuisance, &c., is a good indictment, at common law, for keeping a disorderly house. And evidence, that the defendant kept an open house for selling spirituous liquors, and that such liquors were sold to other persons than boarders and lodgers, and that the house was kept open, and such liquors there sold, on Sundays and at late hours of the night, that persons intoxicated were seen in and coming out of the house drunk and disorderly, is sufficient to support the indictment. The Court will not permit counsel to argue to the jury against an instruction given in the cause.

THE indictment was in these words :

District of Columbia, Washington county, to wit : The jurors of the United States for the county aforesaid upon their oath present, that Charles Columbus, late of the county aforesaid, yeoman, on the fifteenth day of December, in the year of our Lord eighteen hundred and thirty-six, at Washington county aforesaid, and on other days and times between that day and the day of taking this inquisition, with force and arms, kept a certain unlawful, disorderly, and ill-governed house in the city of Washington in the said county, as a common tavern, without any lawful authority or license therefor, did take upon himself to keep and maintain; and the said house did then and there, at the days and times aforesaid, keep as a common tippling-house; and did therein openly sell spirituous liquors to all persons calling for the same, and allow the same to be drunk by such persons, in and about his said house at all times, both at day and at night, and on all days, both Sundays and other days; and did permit certain idle and ill-disposed persons, to the jurors aforesaid unknown, to assemble together in his said house, and then and there continue drinking and tippling, to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals, and against the peace and government of the United States.

F. S. KEY, United States Attorney, District Columbia.

To this indictment the defendant demurred, first, because it does not aver that the defendant kept a common disorderly house; and, second, because it charges the keeping a tavern without license, but does not aver that he kept a common tavern.

All the precedents, the defendant's counsel said, use the word "common;" a single instance of disorder is not sufficient. *Regina v. Pierson*, 2 Ld. Raym. 1197; 3 Chitty's Cr. Law, 678; 1 Russell on Crimes, 300.

Mr. Key, United States Attorney, *contra*, contended that it was sufficiently averred to be a common disorderly house. The indictment charges that the defendant undertook to keep a disorderly house as a common tavern without authority therefor, and did keep the same as a common tippling-house, and therein sold spirituous liquors to all persons calling for the same, to be drunk in and about the house at all times, day and night, Sundays and other days; and permitted idle and ill-disposed persons there to assemble and continue drinking and tippling to the common nuisance, &c. The offence charged is the keeping of a common disorderly tippling-house.

The COURT (CRANCH, C. J., doubting,) overruled the demurrer; being of opinion that it sufficiently appears in the indictment, that the offence charged is the keeping of a common disorderly house.

Upon the trial, *Mr. Key* prayed the Court to instruct the jury, That if they believe, from the evidence, that the defendant kept an open house in the city of Washington for selling spirituous liquors, and that such liquors were sold and drunk in the said house to other persons than boarders and lodgers; and that the said house was kept open on Sundays, and such liquors there sold and drunk by such persons on Sundays, and also at late hours of the nights both of Sundays and other days; and that persons intoxicated were seen in said house and coming out of said house at late hours of the night, drunk and disorderly, such evidence is sufficient to support the indictment.

Which instruction the Court gave, having, yesterday, in the absence of CRANCH, C. J., given a similar instruction in the case of *The United States v. Bede*, published in the National Intelligencer of the 23d of June, 1837.¹

Mr. W. L. Brent, for the defendant, being about to argue to the jury against the instruction just given, was stopped by the Chief Judge, and informed that the Court could not permit him

¹ In the case of the *United States v. Bede*, the indictment was in the same form as that of the *United States v. Columbus*.

The following is the instruction moved by *Mr. Key*, and given by the Court in the absence of CRANCH, C. J.

"That if the jury believe from the evidence that the traverser kept a public and open shop in this city, in which he sold liquors to persons not lodgers or boarders in his house, at times to persons who were drunk, at times to persons who came in drunk, and drank there, and went out drunk; sometimes to persons who came out and went away from his house in a noisy manner and sky-larking in the streets; that his shop was generally kept open on Sundays, and that persons, not lodgers or boarders, bought and drank spirituous liquors in the shop, on Sundays; and that he had no accommodations for travellers or boarders, neither beds nor stables for such accommodation: and that he had no license for keeping a public house from the corporation; then the charge of the indictment is sustained."

Markoe v. Maxcy and Chester.

to argue the point of law to the jury against the instruction which the Court had given to them.

Mr. Brent contended, that as he had not asked the opinion of the Court upon that point, he was not precluded from arguing it to the jury. That in criminal cases the jury are judges of the law as well as of the fact, and, therefore, the law ought to be argued to them.

CRANCH, C. J., observed, that this Court had always refused to permit counsel to argue the question of law after it had been decided by the Court, in the cause. That the jury has a right to find a general verdict, which includes the question of law as well as of fact; but the jury has no right to decide the question of law, disconnected from the fact. That this point had been decided early in the existence of this Court, upon full argument; and that such had been the uniform decision and practice of the Court from its commencement, more than thirty years ago.

Mr. Brent then prayed the Court to instruct the jury, that notwithstanding they might be of opinion, from the evidence, that the tavern of the defendant was kept open on Sunday, the selling of liquor (in a legal point of view) upon Sunday, is no more an offence for which the defendant could be indicted than the selling upon any other day, according to the laws and Constitution of Maryland as in force in this part of the District of Columbia.

Which instruction the Court (*THRUSTON, J.*, absent,) refused to give.

Verdict, guilty.

FRANCIS MARKOE AND WIFE v. VIRGIL MAXCY AND JAMES CHESTER, JR., and GEORGE W. HUGHES AND WIFE v. THE SAME.

When property is conveyed in trust for the sole and separate use of the wife during the term of her life; and after the expiration of such term, for the use of such person or persons and for such purpose as she, by her last will and testament, shall appoint and direct; and in default of such appointment, to the use of her next of kin and personal representatives; a court of equity cannot authorize the trustees to convey the property to the husband, upon a bill filed by him and his wife against the trustees, for that purpose.

THESE were bills in equity by husband and wife against trustees; stating, that before marriage, the wife conveyed certain personal property to the defendants in trust for the sole and separate use of the wife. That she is desirous to settle it all on her husband, and has requested the trustees to convey it to him accordingly, but they refuse because they have not the power, under the trust, to do so.

The trustees, by their answer, admit the facts of the bill, but deny that they can, under the trust, convey the property absolutely to the husband.

The trust is, "to and for the use and benefit of the said Mary G. Maxcy, for and during the term of her natural life. And if the said Mary G. Maxcy shall, at any time hereafter, marry, then that she may have and enjoy, and take the use and profits of the aforesaid property, for and during the term aforesaid, to her sole and separate use, and not to be subject, in any manner, to the control or debts of her husband; and from and after the expiration of the term aforesaid, then in trust to and for the use of such person and persons, and for such purpose as the said Mary G. Maxcy, by her last will and testament, or by any instrument of writing, in the nature of a last will and testament, shall appoint and direct; and in default of such appointment, then to the use of such person or persons as, at the time of the death of the said Mary G. Maxcy, may be her next of kin and personal representatives;" and in further trust that the trustees might, at her request, and in their discretion, sell the property, and re-invest the proceeds in other property, "to be held subject to the aforesaid trusts, and with the like power of disposition," with full power, at her request, "to change the nature of the trust property and securities, whenever, and as often as it shall become necessary and expedient so to do."

The case was submitted to the Court without argument, and, after great consideration,

The COURT (THRUSTON, J., absent,) was of opinion that the wives had no power to convey but by last will and testament, or by an instrument in the nature of a last will and testament, as provided for in the deed of trust; and that the Court could not enable them to do so.

See 2 Kent's Com. 163, 165, 166, 170, and the cases by him cited. *Lovry and Wife v. Tiernan and Williamson*, 2 Har. & Gill, 34-40; *Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. Rep. 90, 102, 103 to 113; and *Ewing v. Smith*, 3 Desaure, 417. See, also, *Sperling v. Rochfort*, 8 Ves. 170; *Chesslyn v. Smith*, 8 Id. 183; *Frederic v. Hartwell*, 1 Cox, 193; *Burford v. Street*, 16 Ves. 135; *Pybus v. Smith*, 3 Bro. C. C. 346; *Newman v. Cartony*, 3 Id. 346, note; *Socket v. Wray*, 4 Id. 483; *Anderson v. Dawson*, 15 Ves. 536; *Richards v. Chambers*, 10 Id. 580; *Reid v. Shergoold*, 10 Id. 370; *Lee v. Muggeridge*, 1 Vesey & Beames, 118; *Fettiplace v. Gorges*, 1 Ves. Jun. 46; S. C. 3 Bro. C. C. 8; *Rich v. Cockell*, 9 Ves. 369; *Fenner v. Taylor*, 1 Simons, 169; *Methodist Episcopal Church v. Jacques*, 1 Johns. Ch. Rep. 450; same case, 3 Id. 77; *Lancaster v. Dolan*, 1 Rawle,

231, 248; *Acton v. White*, 1 Simons & Stuart, 429; *Ritchie v. Broadbent*, 2 Jac. & Walk. 456, and the case of *Gullan v. Trim-bey*, in a note; *Howard v. Damiani*, 2 Id. 458; *Ball v. Montgomery*, 2 Ves. 199; *Rich v. Cockell*, 9 Id. 369; *West v. West*, 3 Rand. 373; *Emery v. Neighbor*, 2 Halsted, 142.

BOWEN & DOWLING v. G. W. HOWARD *et al.*

A judgment of a justice of the peace cannot be seized and sold under a *fiery facias* issued by a justice of the peace.

BOWEN & DOWLING filed their bill in equity for an injunction to prevent the present defendant, Howard, from issuing execution against them, upon a judgment for \$33.50, which he had recovered against them, and which they had paid and satisfied to one Thomas Lloyd, who purchased the judgment at a sale thereof, by a constable who had seized it upon a *fiery facias* issued by one against the said Howard, and sold it under that execution. These facts being stated in the bill, an injunction was granted by the Chief Judge, in vacation, on the 2d of November, 1833.

The bill was taken for confessed, for want of the answer of the defendants, and upon the complainants' motion for a decree for a perpetual injunction.

The COURT, (THRUSTON, J., absent,) upon considering the bill, was of opinion that the judgment could not be seized and sold under a *fiery facias* against the creditor in the judgment, and dissolved the injunction; whereupon the complainants dismissed their bill.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1837, AT ALEXANDRIA.

UNITED STATES *v.* WILLIAM HUDLAND.

A witness, upon cross-examination, is not to be questioned as to any fact, tending to disgrace him, which the party would not be permitted to prove *aliunde*.

INDICTMENT for assault and battery.

Mr. Semmes, for the defendant, in cross-examining John Dixon, a witness for the United States, asked him whether he had been indicted for treason.

The COURT interposed, and said that this Court, after argument, had lately decided, in Washington, that a witness should not, in cross-examination, be asked a question as to any fact, tending to disgrace him, which the party would not be permitted to prove *aliunde*.

Verdict, not guilty.

JOHN WEST *v.* THE COLUMBIAN INSURANCE COMPANY.

In a voyage to Pernambuco, the vessel, when she arrived off Pernambuco, came to anchor off the port, when she might have gone directly in; held, that it was a deviation that discharged the underwriters.

THE defendants insured the plaintiff \$500 on his commissions as supercargo of the schooner *Leonidas*, from Alexandria to Pernambuco, until landed.

The vessel and cargo were insured, by other policies, to Pernambuco, and two other ports. She arrived and came to anchor off Pernambuco, in the outer roadstead, at nine o'clock, A. M. The master went on shore to inquire of the market, and returned in a few hours. A storm came on; the anchor dragged, and the vessel was going ashore. They hoisted sail, and endeavored to crawl off, but could not, and she went on shore. There was evidence that she might have gone safely into the port, if she had not come to in the outer roadstead.

Beale v. Burchell.

Mr. Semmes, for the plaintiff, contends, that the vessel never arrived at Pernambuco; but if she did, she did not remain twenty-four hours in good safety. *Camden v. Cowley*, 1 W. Bl. 417.

Mr. Taylor, contra, prayed the Court to instruct the jury, in substance, that if they should find, from the evidence, that when the schooner arrived off Pernambuco, she could have proceeded to the port without coming to anchor in the outer road, the stopping there was a deviation which discharged the underwriters.

Which instruction, the COURT gave, (*nem. con.*)

Mr. Semmes, then prayed the Court to instruct the jury, that if they believe, from the evidence, that the anchoring of the vessel in the outer road of Pernambuco, was an arrival at Pernambuco, then the plaintiff is entitled to recover, because she was not twenty-four hours in safety after her arrival.

But the COURT (*nem. con.*) refused.

Verdict for the defendant.

THOMAS K. BEALE v. EDWARD BURCHELL.

The Corporation of Alexandria has a right to collect taxes by distress and sale; and to raise taxes for purposes and works out of the town.

The Court will not instruct the jury that the plaintiff has a right to recover, unless all the facts necessary to entitle the plaintiff to recover, are stated in the prayer.

THE COURT (MORSELL, J., *contra*,) refused to give the following instruction to the jury, which was moved by *Mr. R. J. Brent*, for the plaintiff.

1. That if the jury should be of opinion, from the evidence, that the defendant Burchell forcibly opened and entered the outer door of the plaintiff's house to serve the process under which he alleges to have been acting, such entry was illegal, notwithstanding he may have authority, and the plaintiff is entitled to recover a verdict in his favor.

The COURT, (*nem. con.*) also refused to give the following instructions, which were also moved by the plaintiff's counsel.

2. That the defendant had no authority to enter and distrain, and if he did, he is a trespasser. That the corporation has no right to distrain at all, nor to raise taxes for purposes out of the town.

3. That if the jury should be satisfied by the evidence that all, or any part of the taxes for which the defendant distrained, were assessed by the corporation for a work of internal improvement beyond the town of Alexandria, then, as to those taxes, so

assessed, the distress was irregular, and the corporation had no authority so to distrain.

4. That if the jury believe that the defendant procured the partial opening of the outer door by craft, and immediately entered with violence, injuring the wife of the plaintiff, who was holding the door, then the plaintiff is entitled to recover.

In support of his first prayer, *Mr. Brent* cited 2 Saund. on Pleading, 691; 2 Petersdorff's Abr. 326, tit. Arrest; *Gansel v. Lee*, 1 Cowp. 1.

In support of his second prayer, he cited *Luffborough v. Blake*, 5 Wheat. 317; S. C. Condensed Rep. 665; 2 Kent's Com. 275, 339; 3 Wheeler, 457; *Ellis v. Marshall*, 2 Mass. 269; *Rex v. Larwood*, Comb. 316; 2 Wheeler, 470.

Verdict for the defendant.

UNITED STATES v. NEGRO JOSEPH FARRELL.

Slaves are competent witnesses in criminal prosecutions, in Alexandria county, against negroes or mulattoes.

The Act of Virginia, passed on the 21st of January, 1801, is in force in that county, although it was to commence in force from the 1st of June, 1801, and although the jurisdiction of Virginia ceased on the 27th of February, 1801.

If a man be convicted of a second offence, while in the penitentiary under sentence for the first, the sentence for the second may be made to commence from the expiration, or other termination of the period for which he was first sentenced.

INDICTMENT for forging a certificate of freedom for Mr. T. F. Mason's slave Sandy.

The slave Sandy was offered as a witness for the United States.

Mr. W. L. Brent, for the defendant, objected that the Virginia Act of the 21st of January, 1801, by the 4th section of which it is enacted, that "any negro or mulatto, bond or free, shall be a good witness in pleas of the Commonwealth, for or against negroes or mulattoes, bond or free; or in civil pleas where free negroes or mulattoes shall alone be parties," never was in force in the county of Alexandria, because it was not in force on the 27th of February, 1801, when Congress adopted the laws of Virginia, as they then existed, and declared that they should "remain" in force in the county of Alexandria.

Mr. Key, District Attorney, *contra*, contended that Congress intended that the district should have the benefit of all the State legislation up to the 27th of February, 1801. But it is not material whether the Act of Virginia of the 21st of January, 1801, is, or is not in force here, as the 5th section of the Virginia Act of

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the 17th of December, 1792, admits negroes and mulattoes as witnesses in pleas of the Commonwealth against negroes or mulattoes, and in civil pleas where negroes or mulattoes alone are parties; at least, such has been the construction which this Court has always given to it. The words of that section are, "No negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes, or in civil pleas, where negroes or mulattoes alone shall be parties." These words have always been construed to include slaves.

The COURT (THRUSTON, J., absent,) being of that opinion, permitted the slave Sandy to be sworn and examined as a witness.

Verdict, guilty. Sentenced to the penitentiary for four years, on the 13th of May, 1837.

NOTE. The prisoner was again convicted of a like offence, by forging a pass for negro Sam, another slave of Mr. Mason, at October term, 1837, and the entry of the sentence was: "and it appearing to the Court that the traverser is in the custody of the keeper of the penitentiary of the District of Columbia, under the sentence of this Court passed at the last term for a like offence, the sentence of the Court, for the offence of which he is now convicted, is, that he suffer imprisonment and labor in the penitentiary of the District of Columbia, for the period of three years next after the expiration, or other termination of the period for which he already stands committed to the said penitentiary."

ATKINSON'S Legatees v. ISAAC ROBBINS.

The Orphans' Court for the county of Alexandria has authority under the law of Virginia, to regulate and fix the compensation of an executor in settling the estate; and for that purpose may order an inventory to be taken and an appraisement to be made, although the will directs that no inventory should be taken.

The rights of the parties under the will are to be decided by the law of Virginia; the powers and jurisdiction only of the Court, are to be ascertained by the law of Maryland, referred to by the Act of Congress erecting the Orphans' Court.

APPEAL from the Orphans' Court for the county of Alexandria, allowing the executor for his compensation seven and a half per cent. on the appraisement of the stock in trade, which the testator directed not to be appraised, and to be kept in trade to be carried on by one of his sons for the joint benefit of all the children until it should become necessary to divide it among them.

Exception was taken in the Orphans' Court, by *Mr. Semmes*, for the legatees, and overruled by the judge, because, he says, the profits cannot be ascertained but by a comparison of the

present value of the stock, with the value at the time of division ; and because the Orphans' Court, in practice, proceeds under the Maryland law, which requires an appraisement in all cases.

Mr. Semmes, for the legatees, contended that the Orphans' Court had no jurisdiction to have an appraisement made, for the purpose suggested, against the express provisions of the will.

The rights under the will must be determined by the law of Virginia. The powers, duties, and jurisdiction of the court only are to be ascertained by the law of Maryland referred to by the Act of Congress erecting the court. The case of *Nicholls v. Hodges*, 1 Peters, 562, was decided under the express provisions of the Maryland law, which requires the compensation to be made by way of commissions on the amount of the inventory. But there is no statute in Virginia ascertaining the amount of the commissions. The compensation of an executor is by an allowance made by the judges in their discretion according to the circumstances of each case.

Mr. Taylor, contra. By the Act of Congress of the 27th of February, 1801, § 12, [2 Stat. at Large, 103,] the Orphans' Court in each county is to "have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the judges of the Orphans' Court within the State of Maryland."

This is not a question of the right of property ; it is only of the compensation to the executor for his services. His duties are to be ascertained by the law of Maryland. There is no law in Virginia to regulate the commissions. The practice and forms of proceeding must be governed by the Maryland law. Some commission must be allowed, but without an inventory and appraisement it cannot appear how much. There is no evidence from which this Court can say whether the commission is too large. The whole personal estate passes through the hands of the executor, in whom it is vested by law, and the legacies vest only by his assent. He is responsible to the legatees and must finally make a distribution.

The COURT (THRUSTON, J. *contra*,) affirmed the decree of the Orphans' Court.

CRANCH, C. J., stated his opinion to be, that the rights of all parties under the will are to be decided by the law of Virginia. The powers and jurisdiction, only, of the Orphans' Court are to be ascertained by the law of Maryland. The rights of the legatees, and of the executor, are to be governed by the law of Virginia. By that law the court is to fix the compensation of the executor. It is a right which the executor has under that law. The court in Virginia is not obliged to give the compensation in

the form of commissions; but may take the commissions, (or rather the sum upon which commissions might be charged,) as a guide to their discretion. So may the Orphans' Court here. And the Supreme Court has decided in *Nicholls v. Hodges*, 1 Peters, 562, that the rate of compensation is exclusively in the cognizance of the Orphans' Court, and its decision is conclusive.

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BANK OF ALEXANDRIA v. R. I. TAYLOR *et al.*

The Court will set aside a sale made under its decree, if not fairly made.

UPON the return of the report of a sale made under a decree of this Court, in this cause,

Mr. Semmes, for the Misses Herbert, heirs at law of the late Thomas Herbert, deceased, moved to set aside the sale of a house and lot at the corner of Cameron and Fairfax streets in Alexandria, on the ground of a misapprehension at the sale by which persons at the sale were induced not to bid for the property; and offered to sustain the motion by parol *vivâ voce* evidence.

Mr. Neale, for Mr. Corse the purchaser, objected; that it was a novel motion in this country; and that according to the English practice, the whole purchase-money must be brought in and deposited before the biddings can be opened.

Mr. Semmes, *contra*, cited *Tait v. Lord Northwick*, 5 Ves. 655; *Anonymous*, Id. 148; *Chetham v. Grugeon*, Id. 86; *Upton v. Ld. Ferrers*, 4 Ves. 700; *Rigby v. McNamara*, 6 Ves. 117; *West v. Vincent*, 12 Ves. 6; *Fergus v. Gore*, 1 Sch. & Lef. 350; *Wood v. Hudson et al.* 5 Mun. 423; *Quarles v. Lacy*, 4 Mun. 251.

The evidence was, by consent, given *vivâ voce*, and reduced to writing; and showed that the bid of \$1,510 made by Mr. John Corse, was in his hearing declared to be for the benefit of the Misses Herbert, the heirs at law of the mortgagor, the late Thomas Herbert, deceased; which declaration was not denied by Mr. Corse, whereby the by-standers were induced not to bid against him; and that the property at the time was worth \$2,000.

The COURT (THRUSTON, J., absent,) upon this evidence refused to confirm the sale, and ordered it to be set aside.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1837, AT ALEXANDRIA.

JANE H. SLACUM *v.* JOHN M. BROWN.

A lessee cannot abandon for want of repairs, if he has underlet a part of the premises for a year not yet expired, although the premises are in a ruinous condition. The receipt by the lessor of rent from an under-tenant of part of the premises, is no evidence of the lessor's consent to the lessee's abandonment.

DEBT for two quarters' rent on a demise at _____ per annum, due November, 1832, and February, 1833.

Brown the lessee underlet part of the premises to one Thomas, for a year ending on the 1st of November, 1833, who paid Mrs. Slacum for the two first quarters of the year at \$50 a quarter, and tendered to her the rent for the two next quarters.

Mr. Semmes, for the defendant, offered evidence to prove that the premises were very much out of repair, so that he had a right to abandon them, and did abandon them before the rent accrued for which this action was brought, and prayed the Court to instruct the jury "that if they believe, from the evidence, that the premises were so much out of repair as to do damage to the tenant's goods and chattels; and the landlord, on notice thereof, refused or neglected to repair; then that the tenant was not responsible for rent after quitting the premises, although no notice of quitting was given to the landlord;" and cited *Edwards v. Etherington*, 1 R. & M. 268, and Comyn on the Law of Landlord and Tenant, 304; 6 Law Lib. 304, 450.

Mr. Taylor, for the plaintiff, contended that if the premises were so out of repair, yet, as the defendant had underlet a part of them for a year ending on the 1st of November, 1833, he could not in the mean time abandon so as to put an end to the demise, which was from year to year; and that Mrs. Slacum's receipt of rent from the under-tenant of part of the premises, is not evidence of her assent to the abandonment by the lessee.

The Court (*nem. con.*) refused to give the instruction prayed by *Mr. Semmes*, being of opinion that Mr. Brown could not aban-

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don after underletting a part of the premises for the year. That in such a case, the ruinous state of the premises, so that the defendant's goods were liable to be injured thereby, is not sufficient to justify the abandonment; and that the receipt by Mrs. Slacum of rent from the sub-tenant of part of the premises, is not evidence of her assent to such abandonment.

WILLIAM N. McVEIGH v. SAMUEL MESSERSMITH.

If a lot of bacon be advertised in the gazette, by the vendor, as "prime," and the vendee examine it, and afterwards agree to purchase it, and it proves to have been unsound, he cannot recover damages upon the warranty, although he should have paid a sound price for it.

CASE, on warranty of a lot of bacon.

The plaintiff offered in evidence a printed advertisement in the Alexandria Gazette, of a lot of "prime bacon," to be sold by the defendant; and that he paid for it the full price of sound bacon.

The defendant offered evidence to prove that the plaintiff came to the warehouse of the defendant, and looked at the bacon as it hung, and, after examining it as much as he thought proper, agreed to take it. It was sent to his warehouse, and about a week afterwards he gave his note for the amount upon which the defendant recovered judgment at law. The bacon was unsound at the time of sale.

Mr. Semmes, for the defendant, prayed the Court to instruct the jury, in effect, that if there was no other warranty than that contained in the advertisement, and no fraud, and the plaintiff inspected the bacon before he purchased it, he cannot recover in this action. *Calhoun v. Vecchio*, 3 Wash. C. C. R. 165.

Mr. Taylor, for the plaintiff, prayed the Court to add to the instruction, the following: "That if they should believe, from the evidence, that the plaintiff did not fully examine the bacon, and did not mean to rely on his examination, but to rely on the warranty in the advertisement, he did not waive the warranty." *Starkie on Evid.* part 4, p. 1660; *Brink v. Wayne*, 1 Stark. Rep. 504; *Yeates v. Kyne*, 6 Taunt. 446.

Mr. Semmes, in reply. A representation of goods is no warranty. *Caveat emptor*. *Seixas v. Wood*, 2 N. Y. T. R. 55; *Chandelor v. Lopus*, the case of the *Bezoar Stone*, Cro. Jac. 4; *Jackson v. Wetherell*, 7 Serg. & Rawle, 480.

The COURT (CRANCH, C. J., *contrà*,) gave the instruction asked by *Mr. Semmes*, and refused that asked by *Mr. Taylor*.

CRANCH, C. J., was of opinion that it ought to be left to the

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jury to say what was the extent and object of the plaintiff's examination of the bacon, and whether he meant to rely upon that examination or upon the warranty.

Verdict for defendant.

Motion for new trial overruled. CRANCH, C. J., *contrà*.

HARRISON TAYLOR v. W. S. MOORE'S ADMINISTRATOR, JAMES GREEN, and THOMAS IRWIN, JR.

An assignment of rents, with a power of attorney to collect them as they shall become due, is a valid assignment in equity, although the assignor should die before they are collected.

CHANCERY ATTACHMENT. CRANCH, C. J., delivered the opinion of the Court.

The bill states that W. S. Moore was in debt to the plaintiff \$55, and that James Green was indebted to Moore in a larger amount; that Moore was an absent debtor, and that Green resided in Alexandria. The attachment was served on the 19th of July, 1830. Moore died some time in September, 1830. The attachment was returnable to November term, 1830. Green, in his answer, admits that on the 19th of July, 1830, he was indebted to Moore \$208.83½, and afterwards paid to Thomas Irwin, Jr. executor of Thomas Irwin, deceased, \$217.83½, which he claimed under a power of attorney from Moore. This settlement of the rents with Green was made on the 17th of September, 1830, the account having been made up to the 18th of July, 1830, and left with Green by Irwin on the 5th of July, 1830, and paid by Green on the 2d of October, 1830, after the death of Moore. It appeared by Irwin's answer that Moore, being largely indebted to him as executor of Thomas Irwin, deceased, on the 1st of May, 1827, for the purpose of making some provision for the payment of the debt, agreed to appropriate towards the payment thereof, the rents of Moore's property in Alexandria which had been before conveyed to R. I. Taylor, in trust to secure the debt; and in pursuance of that agreement gave the defendant, Irwin, a letter of attorney to enable him to collect the rents and apply them towards the payment of the debt; accompanied by a letter to Mr. R. I. Taylor, of the same date, namely, May 1, 1827. The rents in question became wholly due in the lifetime of Moore, while the letter of attorney was in full force, and Mr. Irwin had a legal right to receive them and apply them to his own use as executor, and Green was bound to pay them to him before the attachment was levied.

Equity will consider that as done which ought to have been done. The power of attorney and letter to Mr. Taylor, and the answer of Mr. Irwin, are evidence of an assignment of those rents to Mr. Irwin; so that at the time of the attachment, Mr. Irwin and not Mr. Moore was the creditor of Green, and there was nothing in his hands upon which the attachment could operate.

The COURT being of this opinion, it is not necessary to decide upon the other objection made by *Mr. Taylor*, the defendant's counsel, that the attachment was dissolved by the death of Mr. Moore before the return of the writ.

The plaintiff's bill must be dismissed with costs.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1837, AT WASHINGTON.

BANK OF THE UNITED STATES *v.* ELIZABETH LEE *et al.*

An agreement by a *feme covert* to relinquish her dower in certain lands, and to mortgage to her husband's creditors other lands held in trust to her separate use, is a sufficient consideration to prevent a post-nuptial deed of trust to her separate use from being a voluntary conveyance; and the subsequent actual release of dower, &c., made it an adequate consideration.

The real consideration of a deed is always examinable, and the parties are not estopped to show what was the true consideration.

The notice which will affect the validity of a first incumbrance must be notice at the time the money is advanced or paid by the second incumbrancer.

It is not necessary that the first grantees should give notice of their claim of title to a second incumbrancer, if they did not know of the second incumbrance at the time of its execution, or before the money was advanced.

Their silence, afterwards, cannot justify a charge of fraud or collusion.

The joint possession, of husband and wife, of property conveyed to her separate use, is no evidence of fraud.

A deed of conveyance of slaves in Virginia, for the separate use of the wife, loses nothing of its validity by the removal of the parties to the county of Washington, in the District of Columbia; and it is not necessary that it should be there recorded.

A power, reserved in a deed of trust, to dispose of any part of the property, with the consent of the trustee, and upon substituting an equivalent, is not evidence of fraud.

An executed consideration is a sufficient consideration for a grant—which is a contract executed—however it may be in regard to executory contracts.

All our conveyances purport to be for a past consideration.

The subsequent conduct of the husband in disposing of some of the slaves without the consent of the trustees, and without substituting an equivalent, is not evidence that the deed was fraudulently made.

THE bill in this case was filed by the Bank of the United States, against Elizabeth Lee, widow of R. B. Lee, deceased, Edmund J. Lee, surviving trustee under a deed of trust for the separate use of Mrs. Lee, and Richard Smith, a trustee under a deed from R. B. Lee, to secure his debt to the Bank of the United States.

The object of the bill is to set aside the deed of trust for the separate use of Mrs. Lee, as being either a voluntary or a fraudulent deed, as to the plaintiffs, who are creditors of R. B. Lee, and to compel Mrs. Lee to surrender the property to Mr. Smith, so that it may be applied to the payment of the debt due to the plaintiffs.

The bill states that R. B. Lee represented himself, in 1817, to be the sole and lawful owner of the property, after mentioned, which was in his possession, as owner.

That the bank lent him \$6,000, upon the security of the property, and he gave his note, indorsed by E. J. Lee and W. Jones, and on the 11th of June, 1817, executed a deed of trust to Richard Smith, of twelve negroes, valued at \$5,000, and all his household furniture, valued at \$2,200, and a claim upon one John Hopkins. That the debt remains unpaid.

That R. B. Lee died in 1827, intestate, insolvent, and no administration has been taken out upon his estate. That his widow, the defendant, Elizabeth Lee, has taken possession of all the property conveyed to Mr. Smith by the deed of trust, and refuses to deliver it up to him for the purposes of the trust.

That by taking possession of the property she has made herself liable, as executrix in her own wrong.

That she claims the property under a pretended deed of trust executed by her husband in January, 1809, which she has exhibited to the plaintiffs.

That if any such deed was executed, it was a voluntary and fraudulent deed, and therefore void as against the plaintiffs, and as against W. Jones, the indorser of the note.

That the considerations expressed in the deed are false, or, if true, insufficient to give it validity.

That at the date of the deed, R. B. Lee was largely indebted, and incompetent, in law, to make the same.

That if the deed was made, and upon legal and adequate consideration, it was executed in Virginia; that the trustees never had possession of the property, but suffered the said R. B. Lee to retain possession of the same, and to use, enjoy, and dispose of the same for his own use and benefit, as if he were the unqualified owner thereof. That it was never recorded in the county of Washington, nor any notice of it given to the public, or to the plaintiffs, in the lifetime of the said R. B. Lee, nor for many years subsequent to his death; but he was permitted to obtain credit upon it, and to sell and dispose of parts thereof. That the defendants, Mrs. Lee, and Mr. E. J. Lee, the only surviving trustee, knew that the plaintiffs had lent the \$6,000 to the said R. B. Lee, in full faith that he was the real and unqualified owner of the property, and knew that he executed the deed to Mr. Smith, to secure the payment thereof, and never communicated to the plaintiffs, or to Mr. Smith, during the life of the said R. B. Lee, nor until several years after his death, the existence of the deed of the 9th of January, 1809, or any other claim inconsistent with the deed to Mr. Smith.

All which actings and doings of the said Elizabeth and Edmund, and their omissions and negligences, as aforesaid, are, as to the plaintiffs, in contemplation of law, fraudulent, and preclude them, the said Elizabeth and Edmund, in law and equity, from asserting any right to any part of the said property against the plaintiffs.

That the said deed of the 9th of January, 1809, for the reasons aforesaid, is fraudulent and void; and if it ever had any legal validity, it ought now, by a decree of this Court, to be annulled.

The bill then prays for a discovery, &c.; and that the deed may be produced and proved, and be decreed fraudulent and void, as against the plaintiffs; and that Mrs. Lee may be decreed to surrender the property to the plaintiffs, and to Mr. Smith, and to account for all that may be deficient, or disposed of; and that she may be personally responsible as executor in her own wrong, for the whole amount of debt, interest, and costs; and that Mr. Smith may be ordered to take possession of the property, and sell the same according to the deed of trust, &c.

Mrs. Lee, in her answer, admits the loan, but not the representations, &c., of Mr. R. B. Lee; admits the deed to Mr. Smith, of the 11th of June, 1817, but avers that she was ignorant of its execution until long after it had been delivered, and never consented thereto, and never waived her right to the property. Admits the judgments against R. B. Lee and W. Jones, and that they are unsatisfied. That R. B. Lee died in 1827, insolvent, intestate, and that no administration had been taken on his estate.

She avers that on the 9th of January, 1809, she and her husband then dwelling, and having for a long time before dwelt in the county of Fairfax in Virginia, and the slaves and other property therein after mentioned, being in the said county, she agreed with her husband to relinquish her right of dower in certain Spotsylvania lands in which her husband held five eighths of eight thousand acres, and also to convey her right in certain Fairfax lands, containing twenty-one hundred acres, including the estate upon which they then resided, (and which were then held by certain trustees for her use,) to certain trustees to secure a debt of \$1,034.28 due by her husband to Judge Washington; in consideration of which, and of her execution of the conveyances, and relinquishment of dower, her husband agreed to convey to Edmund J. Lee, William Maffit, and Richard Colman, all the household and kitchen furniture, &c., then in their dwelling-house and kitchen, estimated to be worth \$1,600, and thirty slaves, named in the answer, in trust for her use during her life, and to her heirs, &c. And that it was further agreed between them, that her husband should be authorized to dispose of, or sell any

part of the said furniture, or slaves, with the consent of a majority of the trustees, &c., provided he should convey to them other property real or personal to the full value of the furniture or slaves which he should so dispose of or sell. And that if he should pay the debt to Judge Washington, without selling any part of the lands thus conveyed in trust to secure it, the conveyance to E. J. Lee and others should be void as to seven of the slaves, particularly named in the answer. And she avers that in pursuance of that agreement, and in consideration of the deed of the furniture and slaves to be made to the said E. J. Lee and others, in trust for her use, she joined her husband in the deed for the Spotsylvania lands on the 16th of July, 1809, relinquishing her dower therein; and on the 9th of January, 1809, executed the deed of trust of the Fairfax lands to secure the debt to Judge Washington; and that on the same day her husband executed the deed of trust of the furniture and slaves to E. J. Lee and others; which deed was fully proved and recorded, within eight months from its date, in Fairfax County Court, in which county they still continued to reside, and in which the furniture and slaves still remained; which deeds are exhibited and marked No. 1, 2, & 3.

That the agreement was *bonâ fide* and without fraud; and that she is a *bonâ fide* purchaser of the furniture and slaves according to the terms of the said deed. She admits that there was no sale of the Fairfax land, and therefore she does not claim the seven slaves, and that they are not in her possession nor subject to her control. She admits that her husband sold George, and substituted Peter; and she emancipated Peter before the institution of any proceeding of the plaintiffs against her for the slaves. That her husband sold Henry, Milly, Letty, and her two sons, and substituted nothing in their place, except some articles of furniture for Letty and her two children who were sold with the consent of the trustees. That John, Kitty, Frank, Harriet, and Caroline are in her possession. That a great portion of the household and kitchen furniture, &c., has been destroyed in the using, during the period of twenty-six years, and she annexes a schedule of what remains. That the seven slaves were not included in the deed of her husband to Mr. Smith. She denies her liability to account to the plaintiffs for the property conveyed in trust for her use. She admits that her husband was considerably indebted when he made the deed of trust for her use; but denies that it was, in law, a voluntary conveyance; and avers that it was made to procure for her husband the means of discharging a portion of those debts.

She denies that she concealed her title and claims to the furniture and slaves, or by any culpable silence induced or suffered

the plaintiffs, or any persons to purchase or receive a conveyance of the same from her husband. She states that her husband died in 1827; that they lived together until his death. That her possession could not be separated from that of her husband, and was consistent with the deed.

She admits that he sold some of the slaves, under the pressure of great necessity, without her consent or that of her trustees.

She avers that at the time the plaintiffs lent the money to her husband she was not informed that it was intended to be secured, or was secured by the deed to Mr. Smith. That she was not informed that such security had been given, until a long time afterwards; but she cannot recollect the time at which such information was first received.

That in addition to the said deed to Mr. Smith, further security was given by a deed from Overton Carr and her husband to Mr. Smith for certain lots in the city of Washington, and by the assignment of the debt due by John Hopkins, and by the conveyance of a tract of land called Langley.

That the money lent by the plaintiffs to her husband, or some part of it, was applied by him to the purchase and improvement of the lots conveyed by him and Overton Carr to Mr. Smith.

That she has no knowledge that at the time the securities were given any information was given to the plaintiffs, or to Mr. Smith, that her husband had executed any prior deed of any part of the property mentioned in the said deeds.

That her husband had remained considerably indebted at the time of his death, but she does not know the names of his creditors, nor the amount of his debts.

That she asserted her right to the slaves thus conveyed by her husband to Mr. Smith as soon as she was informed of the attempt of the plaintiffs to obtain possession thereof under the deed to the said R. Smith. She admits that the debt to Judge Washington has been paid, but she knows not out of what funds.

Mr. E. J. Lee, in his answer, states, that he and the other trustees never had possession of the property; but several times interfered to protect it from the creditors of Mr. R. B. Lee.

That he never gave the plaintiffs notice of the deed of trust to him and the other trustees.

That he did not know of R. B. Lee's deed to Mr. Smith until shortly before R. B. Lee's death.

That he is advised that the deed of trust of 1825, from R. B. Lee and wife, to R. Smith, for further securing the debt, is an abandonment of all lien which the plaintiffs ever had by virtue of the deed to R. Smith, of 1817.

Mr. Richard Smith, in his answer, states that the property con-

veyed to him by R. B. Lee and Overton Carr, has been sold to the best advantage, and the proceeds have been applied towards the extinguishment of the debt ; but that nothing has been obtained from the claim upon Mr. Hopkins, nor from the land called Langley. Mrs. Lee having claimed the same, and obtained an injunction, which is still pending in Virginia.

That he had no notice of Mr. Lee's claim to the furniture and slaves, until all the other securities had failed, and he was about to execute the powers given him by the deed of trust of 1817.

The following facts were agreed by the counsel of the parties, namely :

That R. B. Lee and wife were housekeepers and resided together in Fairfax county, in Virginia, on the 9th of January, 1809, and the said R. B. Lee then held the property mentioned in the deed of trust of that date, and that the property continued in their possession after, as before, the execution of that deed, and so continued until they removed to Washington city in 1814 or 1815, and brought the property with them. After which the household furniture was assessed to R. B. Lee ; and four of the slaves were, for the first time, assessed to him in 1818.

That prior to the 9th of January, 1809, R. B. Lee was seized in fee of five eighths of eight thousand acres of land in Spotsylvania county, in Virginia, which was conveyed by him and wife to Ludwell Lee in fee-simple.

That the execution, due acknowledgment, and recording of the deeds and bills of sale exhibited with Mr. Lee's answer, are admitted ; and also the execution and services of the notices referred to in Mr. E. J. Lee's answer.

That the deed of trust of the 9th of January, 1809, was delivered to the trustees therein named ; that they agreed to act, but never took possession of the property, or of any part of it.

The cause was set for hearing on the bill, answers, general replication, exhibits, and facts agreed, and was argued by *Mr. R. S. Cox*, for the plaintiffs, and *Mr. Marbury*, for the defendants.

CRANCH, C. J., (*THRUSTON, J.*, absent,) delivered the opinion of the Court :

The principal question in the case is, whether the deed of the 9th of January, 1809, from R. B. Lee to E. J. Lee and others, in trust for the defendant, the wife of R. B. Lee, is valid against his subsequent creditors.

The execution, due acknowledgment, and recording of that deed, as well as the deed of R. B. Lee and his wife to Ludwell Lee, of the 16th of July, 1809, and the trust-deed to Turner and others to secure Judge Washington, are admitted.

The bill avers, that if the supposed deed of the 9th of January,

1809, was ever executed, it was a voluntary and fraudulent deed; and that the considerations expressed in the deed were false.

To this allegation the defendant, Mrs. Lee, answers, in substance, that her agreement to relinquish her right of dower in five thousand acres in Spotsylvania county, and to mortgage other lands in Fairfax county, which were then held by trustees for her use, to secure a debt due by her husband, was the consideration of his agreement to convey to E. J. Lee and others, for her use, the property described in the deed of the 9th of January, 1809; and that in pursuance of that agreement the deeds were executed accordingly.

This answer, being thus directly responsive to the allegations of the bill, is evidence of a sufficient valuable consideration to support the deed of trust of the 9th of January, 1809, under which Mrs. Lee claims.

It was not a voluntary deed, and, therefore, it is immaterial whether Mr. R. B. Lee was, or was not, indebted at the time of executing it. The relinquishment of dower is as fair and meritorious a consideration as the payment of a sum of money.

The payment of Judge Washington's claim did not impair the validity of the deed, but operated as a release only, of a certain portion of the slaves therein described.

The fact that the deed to Ludwell Lee, for the five thousand acres of Spotsylvania land, was not executed by Mrs. Lee and her husband until the 16th of July, 1809, although the recital in the deed of trust of the 9th of January, 1809, states it to have been then executed, does not make the deed void. The real consideration of a deed is always examinable; and the parties are not estopped to show what was the true consideration. The agreement to release the dower was a sufficient consideration to prevent the deed from being a voluntary conveyance; and the subsequent actual release of dower made it an adequate consideration. That agreement is proved by Mrs. Lee's answer, which is responsive to the allegation in the bill that the deed was without consideration. The recital is, or is not, an estoppel to the parties to deny that the deed to Ludwell Lee was executed on the 9th of January, 1809. If an estoppel, the recital must be taken to be true. If not an estoppel, the true consideration may be proved, namely, the agreement to release the dower; and that is proved by Mrs. Lee's answer.

If it was not a voluntary conveyance, it can only be impeached on the ground of fraud; and if the consideration was adequate, there can be no pretence for a charge of fraud. Nor is there sufficient evidence to charge Mrs. Lee with any fraudulent conceal-

ment of her title ; or collusion with her husband to deceive the plaintiffs before, or at the time, of their lending the money to Mr. Lee, or of their taking his deed of trust to Mr. Smith. Indeed, the bill does not charge it. It only avers that Mrs. Lee and Mr. E. J. Lee knew that the plaintiffs had lent the money to R. B. Lee, in full faith that he was the real and unqualified owner of the property ; and knew that he executed the deed to secure the payment of the money, and never communicated to the plaintiffs the existence of the deed of the 9th of January, 1809. This charge relates to a time subsequent to the execution of the deed, when neither Mrs. Lee, nor Mr. E. J. Lee, was bound to communicate any such information to the plaintiffs. Nor can their silence, after the execution of the deed, justify a charge of fraud or collusion. The time when the money was advanced is that at which the notice is material. Lord Chancellor Thurlow in *Beckett v. Cordley*, 1 Bro. C. C. 258.

But if the bill had charged them with a fraudulent collusion at the time of Mr. R. B. Lee's deed of trust to Mr. Smith, their answers expressly deny concealment of the claim and knowledge of Mr. R. B. Lee's deed to Mr. Smith, and of his intention to secure the plaintiffs by such a deed until long after it was executed.

It has been contended, that the continued possession of Mr. R. B. Lee after the execution of the deed of trust of the 9th of January, 1809, is evidence of fraud. But that possession was perfectly consistent with the use raised by the deed. As long as Mr. and Mrs. Lee continued to live together she could only enjoy the use of the furniture and slaves, jointly with him ; and her possession would appear to be his possession. Her use of property, in that way, could not be evidence of fraud.

The deed was a contract made in Virginia, and was executed with all the formalities necessary to make it valid there. The title to the property was complete, and was valid between the parties wherever they might be. By removing to the District of Columbia, the title was not impaired. There is no ground for supposing it to be necessary that the deed should be acknowledged or recorded in this district.

The power, reserved by Mr. Lee, to dispose of any part of the property with the consent of the trustees, and upon substituting an equivalent, it is said, is a badge of fraud. But it is only a general power of revocation which is a badge of fraud ; whenever the consent of other independent persons is required, or an equivalent is to be substituted, there can be no objection to the power of revocation ; it affords no evidence of fraud.

It is objected that if the recital is to be taken as true, and if the relinquishment of dower had been made before the execution of

the deed of the 9th of January, 1809, the consideration was executed, and therefore was not sufficient to sustain the deed.

But this objection, I apprehend, applies only to executory contracts, not to conveyances. An executed consideration may not be sufficient to sustain an executory contract, and yet a past or executed consideration may be a sufficient consideration for a grant; which is a contract executed *in presenti*—not to be executed *in futuro*. If the objection is applicable to this deed, it is applicable to all our conveyances; for they also say “in consideration of” so much money, “at or before the sealing and delivery of these presents, in hand paid, the receipt whereof,” the grantor “hereby acknowledges,” &c.

The money may have been paid a year before, or the consideration may be an old debt, and yet we have never heard an objection to such a consideration of a deed; and the deed under which the plaintiffs themselves claim, is given for a past or executed consideration, namely, the sum of \$6,000 loaned on the day preceding the date of the deed, the receipt whereof the said R. B. Lee thereby acknowledged; and no other consideration is averred in the deed.

It is objected that the use which Mr. Lee made of the property, by disposing of some of the slaves, and mortgaging others, &c., without the consent of the trustees, or of Mrs. Lee, and without substituting an equivalent, was inconsistent with the nature of the deed, and therefore is evidence that the deed was fraudulent.

But as between Mrs. Lee and him, or those claiming under him, (as the plaintiffs do,) it is no mark of fraud. It is a matter entirely between her and him, or his assigns. If he has violated the rights of Mrs. Lee, and she chooses to acquiesce rather than quarrel with him, no third person has a right to interfere; the property was hers, and she had a right to do with it as she pleased; and, because she has submitted to some violation of her rights, it does not follow that she must relinquish what are left.

We are of opinion, that the deed of trust of the 9th of January, 1809, to Mr. E. J. Lee, Mr. Maffit, and Mr. Colman, was a good and valid deed, made *bonâ fide*, and upon a valid and valuable consideration, and has not been impaired by any subsequent conduct or transactions of Mrs. Lee, or her trustees, and that the bill must be dismissed with costs.

Bill dismissed. Affirmed by the Supreme Court of the United States, February 11, 1839.

 Dick v. Laird.

ELIZABETH DICK v. WILLIAM LAIRD, Executor of John Laird, and surviving partner of John Laird & Co.

Where, during a long period of mercantile intercourse between the principal and factor, it appeared that the principal was permitted, upon shipments of tobacco, to draw bills for the estimated value thereof, which bills the factor was in the habit of accepting and paying, whether the cargoes were, or were not sold; the factor being generally in advance, and charging interest upon his advances, and giving credit for interest upon the net proceeds of the cargoes, shipments made, after the dissolution of the firm of the principal, by the death of one of the partners, to the factor, (upon the credit of which shipments bills were drawn by the surviving partner, according to the usual course of their former dealing,) were held to have been made according to such usual course, and were not to be applied to the liquidation of the general debt due by the principal to the factor at the time of the dissolution; but were to be applied, in the first place, to meet the bills drawn upon the credit of such shipments; and the surplus only, if any, to be applied to the liquidation of the general balance due by the principal to the factor.

But if the bills thus drawn by the surviving partner, and paid by the factor, exceeded the net proceeds of the cargoes thus shipped after the dissolution of the firm, the excess was not chargeable to the estate of the firm, but to the survivor only; it not being competent for him to charge the estate of the firm, by drawing bills after the dissolution.

BILL IN EQUITY by Elizabeth Dick, in behalf of herself, and such other creditors of the late firm of John Laird & Son, and of John Laird, as shall choose to be made parties, and contribute to the expenses of the suit; against William Laird, surviving partner of the firm of John Laird & Son, and sole executor of the will of John Laird, deceased.

The bill seeks to charge the joint effects in the hands of the surviving partner, and the separate estate of John Laird, deceased, in the hands of his executor, and for an account, and for a receiver, &c.

The cause came before the Court, upon an exception to the auditor's report, disallowing a claim of James Dunlop & Company, of London, for a balance of £5,020 2s. against the effects of the late firm of John Laird & Son, in the hands of William Laird, the only surviving partner.

The case was argued by *Mr. Redin*, for Dunlop & Co., who cited *Hammonds v. Barclay*, 2 East, 227, that an acceptor has a lien on the shipments; and *Hamersley v. Lambert*, 2 Johns. Ch. R. 508, that dealing with a surviving partner does not discharge the old firm.

Mr. Marbury and *Mr. Key*, *contrà*, cited *Dob v. Halsey*, 16 Johns. 34; *Campbell v. Matthews*, 6 Wend. 551, and *Evernshim v. Ensworth*, 7 Id. 326, that a partner has no right to pay his private debts with partnership funds. *Clayton's case*, 1 Meriv. 530, 604; that if the creditor has kept a continuous account after the death of one of the debtor partners, the subsequent payments

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are to be applied to the extinguishment of the old debt ; *Simpson v. Ingham*, 2 B. & C. 65, S. P., and *Pemberton v. Oakes*, 4 Russell, 154, 168, and *Abel v. Sutton*, 3 Esp. 108 ; *Lansing v. Gaine et al.* 2 Johns. 303 ; *Sanford v. Nicholls*, 4 Id. 227 ; *Devaynes v. Noble*, 1 Meriv. 602 ; and *Brighton's case*, Id. 620, that the surviving partner had no right to draw bills so as to create a new obligation upon the old firm.

They contended, also, that Dunlop & Company were bound to apply the proceeds of the joint property shipped after the dissolution of the firm, to extinguish the debt of the firm, and should have charged the bills of William Laird, drawn after the dissolution, to his separate account.

The bills were not drawn specifically upon the credit of any particular shipment, but generally, on the promise of shipments ; nor are the acceptances charged specifically against correspondent shipments.

Dunlop & Company ought not to have permitted William Laird to draw, when they knew he was trading on the partnership funds, after the death of John Laird, at the hazard of his heirs, and ought not to be permitted to resort to his estate.

Mr. Jones, in reply, cited *McLeod v. Drummon*, 17 Ves. 152 ; *Keane v. Roberts*, 4 Mad. 332, and *Hamersley v. Lambert*, 2 Johns. Ch. Rep. 508, as to the powers and duties of a surviving partner ; and *Sleach's case*, *Pulmer's case*, and *Clayton's case*, 2 Meriv. 538, 623, as to the application of payments. *Simpson v. Ingham*, 2 B. & C. 65, S. P. See *Newmarch v. Clay*, 14 East, 239.

CRANCH, C. J., (THRUSTON, J., absent,) delivered the opinion of the Court.

This cause now comes before the Court upon an exception to the auditor's report disallowing a claim of James Dunlop & Company, of London, for a balance of £5,020 2s. against the late firm of John Laird & Son in the hands of William Laird, the only surviving partner.

The principal question is, what was the intent with which William Laird shipped to James Dunlop & Co. the tobacco which was on hand in Georgetown, at the death of Mr. John Laird, and which had been purchased in his lifetime with the joint funds of John Laird & Son ; and with what intent it was received by Dunlop & Co. ; for that intent, if ascertained, must govern the application of the proceeds of the sales of that tobacco. The intent and understanding of the parties constituted the contract between them.

It appears by the bill and answer, and the accounts of James Dunlop & Co. with John Laird & Son ; and of John Laird & Son with James Dunlop & Co. as kept by them respectively, that

John Laird & Son were merchants residing in Georgetown in the District of Columbia, and that James Dunlop & Co. were merchants residing in London. That a long course of business had been carried on between them, for many years, which consisted of shipments of cargoes of tobacco by John Laird & Son to James Dunlop & Co. for sale, in London or elsewhere, by the latter firm, for and on account of the former. That the understanding and practice, if not the express contract, was, that John Laird & Son should be permitted, upon every shipment so made, to draw upon James Dunlop & Co. at sixty days sight for the probable amount of the proceeds of sales of the tobacco so shipped and consigned to them; and that they would accept, and, at maturity, pay such bills, whether the tobacco should then have been sold or not, and whether they should or should not then have actually received the proceeds thereof; it being understood that interest should be charged upon their acceptances, and credited upon the proceeds of sales. It was therefore a case of principal and factor. Each consignment was a bailment for sale and remittance; not a general payment on account. It was the fund to meet the bills drawn, and to be applied in the first place solely to that object. If the proceeds of the sales exceeded the bills, the surplus, and that only, could, in good faith, be applied by James Dunlop & Co. to the extinguishment of any general balance of account which might be in their favor. If the agreement had been that James Dunlop & Co., instead of accepting the bills of John Laird & Son, should remit the proceeds of sales by bills drawn in Europe upon merchants in this country in favor of John Laird & Son, the nature of the business would have been the same. It would still have been a case of principal and factor. Dunlop & Co., it is true, had a lien on the goods of their principal for any general balance due to them; but they were not bound to resort to it; nor could they do so in good faith after so long and uniform a course of credit, as justified Laird & Son in expecting that their bills would be honored, unless Dunlop & Co. should have cause to doubt the solvency of Laird & Son.

The object of Laird & Son was to receive here, as soon as possible, the proceeds of the sales so that they might invest them in other cargoes, and thus continue a business advantageous to both parties; to Laird & Son by the profit on the sales; and to Dunlop & Co., the factors, by their commissions for transacting the business. In this manner the business was regularly carried on, Dunlop & Co. being generally in advance, until the death of Mr. John Laird, on the 11th of July, 1833, when it appears by the accounts, as kept by both firms, that there was a balance due to Dunlop & Co. of £4,232 6s. 3d.

For this balance Dunlop & Co. had a right to charge the joint estate of John Laird & Son, and the separate estate of each of the partners, in case the joint estate should be insufficient; and have still a right so to do, unless that balance has been paid.

But it is contended that that balance has been paid, by consignments (made by W. Laird the surviving partner) of tobacco which was on hand, in this country, at the time of Mr. John Laird's death; and which had been purchased, in his lifetime, with the joint funds; although, at the time of making those consignments, the surviving partner drew bills on Dunlop & Co. the consignees, for the full value of the tobacco thus consigned, which bills they accepted and paid before the proceeds of the sales of that tobacco came to their hands.

It is supposed in argument that when these consignments were made, no appropriation was made of the proceeds by either party, the consignor or consignees; and that, as this is a case between conflicting creditors, the consignment, or the proceeds thereof, must be considered as payments made without application to any particular items of the account, and therefore the Court must apply them to the oldest items on the debit side; which would include the whole balance due at the time of the death of Mr. John Laird; and that as the estate of Mr. John Laird is not liable for any balance due upon transactions since his death, the claim of Dunlop & Co. was properly excluded by the auditor from all participation in the funds of the firm of John Laird & Son, and in the estate of the deceased partner John Laird. This doctrine is built upon the decision of Sir William Grant, the master of the rolls, in *Clayton's case*, which constitutes a part of the case of *Devaynes v. Noble*, 1 Merivale, 585, which is a leading case upon this point, and has been confirmed by several subsequent cases. In that case, Clayton had deposited money in a banking-house consisting of Devaynes and four other partners. Devaynes died, and the other partners continued the business under the same name for several months, and then became bankrupt. At the time of the death of Devaynes, Clayton had in the bank £1,713, and before he deposited any further sums he drew out several sums, amounting to £1,260, reducing his balance to £453. From this time to the bankruptcy he both paid in and drew out considerable sums; but his payments were so much larger than his receipts, that at the time of the bankruptcy his cash balance in the hands of the surviving partners exceeded £1,713, the amount of his cash balance at Devaynes's death. It was admitted that the £1,260 which he drew out after Devaynes's death, and before he made any new deposits, extinguished so much of the old balance, and the contest was only as

to the £453. As to which it was contended by the representatives of the deceased partner, Devaynes, and so decided by the master of the rolls, that although Clayton subsequently deposited more money than he drew out, so that his balance at the time of the bankruptcy was larger than it was at Devaynes's death; yet as he had, after his new deposits, drawn more than £453, without applying his drafts to any particular sums deposited, his drafts were to be applied to the oldest debits in his account; and therefore the whole balance due at Devaynes's death was extinguished before the bankruptcy.

In order to make that case applicable to the present, it must be shown that the consignments of the tobacco which was on hand at the death of Mr. John Laird were payments upon general account without any particular appropriation or application of the proceeds of the sales.

We think they were not. The former consignments, in the lifetime of Mr. John Laird, were never considered, by either of the firms, as payments, but as consignments by the principal to his factor, or agent, for sale and remittance; for which services the factor was to receive his wages, by way of commission.

It appears by the accounts of the parties with each other, that Laird & Son, when they made their consignments, drew bills for the estimated proceeds of the sales, which bills were accepted and paid by Dunlop & Co., who appear, during the lifetime of Mr. Laird, to have been content to await the contingency of the proceeds of the sales exceeding the amount of the bills drawn upon them, so as thereby to liquidate the balance of their general account, which, however, was, in the mean time, bearing interest.

That the bills were thus drawn upon the shipments, appears not only by the accounts of the parties with each other, as exhibited and proved, but by the averments of the plaintiff in her bill, and by the supplemental answer of the defendant, which is directly responsive to the allegations of the bill, and drawn out by exceptions to his first answer upon this very point.

The plaintiff, in her bill, avers "that large quantities of tobacco, or the proceeds of sale thereof, were in the hands of the said J. Dunlop & Co., of London, at the death of the said John Laird; and large quantities of tobacco, on hand at the death of the said John Laird, were further shipped to them after the said John Laird's death, by the defendant as surviving partner, to be sold and disposed of on account of the firm. A statement, in detail, of all these tobaccos, and the proceeds of sale thereof, the defendant is called on to produce."

And the plaintiff, in her bill, prays that the defendant "may state what tobacco, and the cost and value thereof, belonging to the

said concern, was in Europe and in this country (distinguishing respectively) at the death of the said John Laird, not then sold, or the account of sales of which were not then received ; when the said tobacco was shipped ; how disposed of ; when the same was sold, and by whom ; and to whom the same was shipped ; and what were the proceeds of such sales ; and when, by whom, and how received and applied." And she further in her bill prays that the defendant "may state and show an account of all drafts and bills drawn by him, since the death of his father, on James Dunlop, or James Dunlop & Co., of London, or any other person or persons, for the proceeds of tobacco sold or shipped, with the dates and amounts of the said bills, and what they produced, and how he applied the proceeds thereof."

The plaintiff took many exceptions to the defendant's first answer ; one of which (the sixth) was, "Because the defendant has failed to state and show, as called for by the complainant, an account of all drafts and bills drawn by him since the death of John Laird, on James Dunlop, or James Dunlop & Co., of London, or any other person or persons, for the proceeds of tobacco sold or shipped, with the dates and amounts of said bills, and what they produced, and how he applied the proceeds thereof."

And another exception, (the fourth) was, "Because the defendant has failed to exhibit a statement, in detail, of the tobaccos, and the cost thereof, and the proceeds of sale thereof, in the hands of J. Dunlop & Co., at John Laird's death, the property of the said late concern of John Laird & Son ; and also the quantities and cost of the tobaccos shipped to the said Dunlop & Co., of London, after John Laird's death, the property of the said late concern, and the proceeds of sale of all said tobaccos."

In answer to these averments and calls for information and exceptions, the defendant, in his supplemental answer, among other things, says, that "James Dunlop & Co. had no funds of the partnership estate in their hands at John Laird's death.

"On the contrary, when the tobacco in their hands at that time, and the bills of exchange drawn thereon, at John Laird's death, together with interest, were respectively brought to account, James Dunlop & Co. were creditors of John Laird and Son, at John Laird's death, £4,232 6s. 3d. sterling."

And again he says, in answer to the fourth exception, "that the tobacco and the cost thereof, and the proceeds of sale thereof in the hands of James Dunlop & Co. at John Laird's death, and the amount drawn thereon, were as follows," &c. He then gives a particular statement of the several cargoes in the hands of J. Dunlop & Co. and the proceeds thereof, and says : "Amount of the bills drawn in John Laird's life upon such shipments, (the amount

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and date of each being shown in the partnership books, and in the account of James Dunlop & Co., marked A, of the 1st of August, 1835, filed in this cause with the auditor, and which are hereby referred to as part hereof,) £40,114 15s. 2d., to which add interest and several small payments, as stated in said books and account, and the balance due James Dunlop & Co. at the death of the said J. Laird was £4,232 6s. 3d."

Again he says, "that the quantities and cost of the tobacco shipped to James Dunlop & Co. by this defendant, as surviving partner after the said John Laird's death, and the proceeds of sale thereof, and the amount of bills drawn upon those shipments, by this defendant, as surviving partner, were as follows : —

		Cost.	Proceeds.
Brig Zior,	331 hhds.	\$38,088.63	£6,095 3s. 9d.
Ganges, third voyage,	301 "	10,593.07	2,484 0 0
To France, per Caze-	} 84 "	8,360.00	2,516 3 2
nove and Utica,			

and the amount of bills drawn by this defendant as surviving partner, upon such last-mentioned shipments, (the amount and date of each are also shown in the partnership books, and in the account of the said James Dunlop & Co., marked B, of the said 1st of August, 1835, filed with the auditor in this cause, and which are hereby referred to as part hereof,) £10,908 6s. 8d., to which add interest and some small payments stated in said books and accounts, and the balance due James Dunlop & Co. on these last-named shipments and drafts, was and is £787 15s. 9d."

At the foot of the accounts of James Dunlop & Co., marked A and B, and referred to by William Laird, the surviving partner, as part of his answer, is the following certificate signed by him : "These accounts are correct. The account A shows the shipments prior to John Laird's death, to James Dunlop & Co., and the tobacco then in their hands, or for which accounts of sales had not been rendered ; and all the drafts drawn prior to his death, and the balance due James Dunlop & Co. after realizing the proceeds of those shipments. This account B, shows all the shipments made by me to them, as surviving partner, of all the tobacco here at John Laird's death, and the drafts which I drew, as surviving partner, on those shipments. WILLIAM LAIRD."

These accounts show the dates of the several bills drawn by the surviving partner, after the death of John Laird ; and the books of John Laird & Son, as kept by the surviving partner, show the times of the shipments of the tobacco on hand ; and by comparing the dates of the bills with the times of shipment, a strong presumption arises independent of all other evidence, that the bills were drawn upon the consignments, and accepted on the faith that the

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proceeds of the sales should come to the hands of the acceptors, to meet or reimburse their acceptances.

Taking the whole evidence together, that fact seems to be proved beyond all doubt.

The fact, that Dunlop & Co. accepted the bills upon the faith of the consignments, is, to our minds, conclusive evidence that the acceptances and the consignments were intended, by both parties, to meet and to be set against each other, and that the proceeds of the consignments were in the first place to be appropriated and applied to the acceptances.

This, we think, was clearly the case during the lifetime of Mr. Laird.

It is stated in the answer of Mr. W. Laird, and admitted in argument, "that at the death of the late John Laird, the late concern of John Laird & Son had a considerable amount of tobacco on hand here, destined for shipment in like manner; and for the conveyance of a great portion of which a vessel had been chartered, and was engaged in loading; and James Dunlop & Co., of London, advised of the intended consignment of her cargo to them; all previous to the death of John Laird; and that the concern were on the look-out for another vessel to take another cargo over and above the one last-mentioned."

It appears by the accounts of the parties, and is admitted in argument, that the tobacco thus on hand at the death of Mr. Laird, was immediately shipped and consigned, by the surviving partner, to Dunlop & Co., agreeably to the advice which had been forwarded to them in the lifetime of Mr. Laird; and that shipment, it seems, was destined to be, and was, made "in like manner;" that is, in the same manner as the former shipments had been made, namely, for sale and remittance; or to meet the acceptances of the bill drawn upon it. The engagement thus made in the lifetime of Mr. Laird, was promptly and honorably fulfilled by the surviving partner. It was an engagement as binding in honor and conscience upon the survivor as any other contract made in the lifetime of his partner; and Dunlop & Co., being as much bound by the long and uniform course of business between the two houses, to accept the bills drawn by the surviving partner upon the tobacco of the firm shipped by the surviving partner, as they would have been to accept the bills drawn by the firm upon tobacco shipped by the firm in the lifetime of Mr. Laird, accepted the bills drawn by the surviving partner upon the tobacco thus shipped.

By accepting these bills, Dunlop & Co. admitted that this shipment was not a general payment on account; and could not, in good faith, have applied the proceeds of the sales of this tobacco

to the general balance due to them by Laird & Son; nor could they, in good faith, after the long and uniform course of dealing between the two firms, have refused to accept the bills of the surviving partner, after advice of the shipment, unless, after being advised of the intended consignment, they had given notice to the surviving partner, before the bills were drawn, that they would not accept them; or unless they had reason to believe the firm of Laird & Son to be insolvent, or in doubtful circumstances.

The drawing and acceptance of the bills drawn upon this shipment is evidence that both parties considered the proceeds of sales as appropriated to the payment of the acceptances in the first instance, and not as a general payment, the appropriation and application of which has not been made by either party.

Mr. Laird, the surviving partner, had no other fund in the hands of Dunlop & Co. upon which he could draw, than the tobacco thus shipped. It would seem, therefore, that nothing could be more evident, than that the proceeds of the shipment were appropriated, in the first place, to the discharge of the bills thus drawn thereupon.

Such being the case, and there being no general payments on account made by Laird & Son to Dunlop & Co. which can be applied to the general balance due to them at the time of the death of Mr. Laird, that balance has never been paid, and they have a right to look to the estate of the deceased partner, if there be a deficiency of joint assets.

Thus far we have been considering only the liability of the joint estate of Laird & Son for the balance due by them to Dunlop & Co. at the time of the death of Mr. John Laird.

But Dunlop & Co. claim against the same joint estate, a further sum of £787 15s. 9d., being the amount overdrawn by W. Laird, the surviving partner, upon the shipments of the tobacco which was part of the joint estate, and which was shipped, after the death of Mr. John Laird, and consigned to Dunlop & Co. in like manner as the former shipments had been.

It is contended that the estate of John Laird & Son ought not to be charged with the amount thus overdrawn.

Mr. W. Laird, the surviving partner, had certainly a right to sell the tobacco of the firm remaining on hand at the time of the death of Mr. John Laird; and to sell it here, or in Europe, according to his discretion. Deeming it, no doubt, best to sell it in Europe, he shipped it to Dunlop & Co. for sale, and as the means of getting the proceeds into his hands, in order that he might pay the joint debts and sell the estate, he had a right to draw bills upon the shipments; but he could not, by drawing those bills, create a new responsibility upon the joint estate. In settlement

of the partnership he could be charged only with the net proceeds of the sales of the tobacco. If he drew for more and his factor accepted and paid the bills, the acceptor could look only to William Laird, the drawer, for the amount overdrawn. By the death of Mr. John Laird, the partnership was dissolved. The survivor could not, by drawing bills in the name of the firm, bind the joint estate in any new obligations. If he had shipped the tobacco to a factor with whom Laird & Son had not had any previous dealings, and had drawn bills for more than the net proceeds, and the factor had accepted and paid those bills, he could have had no pretence to charge the balance upon the joint estate of Laird & Son; nor could Dunlop & Co., when they knew, at the time of accepting these bills, that the partnership of John Laird & Son had been dissolved by the death of one of the partners. They could only have accepted the bills upon the faith of the consignments, and the personal credit of William Laird, the drawer.

If Mr. W. Laird sold these bills and applied the whole proceeds of the sales thereof to the discharge of partnership debts, he will, in the settlement of the partnership account, have credit for the full amount thus applied; that is, to the full extent of the proceeds of the sales of the bills. If Dunlop & Co. should recover from W. Laird the amount which he has overdrawn, he would have no credit therefor in the partnership account, because he would already have had credit for the whole amount of sales of his bills. If, instead of paying partnership debts with the proceeds of the sales of his bills, he applied them to his own use, and Dunlop & Co. should recover from him the amount thus overdrawn, he could have no pretence for charging it in the partnership account, because the partnership never derived any benefit from the bills.

Thus, in whatever way the subject is considered, we think it very clear that the joint estate of Laird & Son cannot be charged with the £787 15s. 9d. overdrawn by Mr. W. Laird upon the tobacco of Laird & Son, shipped to Dunlop & Co. after the dissolution of the partnership by the death of Mr. John Laird.

Upon the whole, then, we are of opinion that the balance of £4,232 6s. 3d. sterling, due by John Laird & Son to James Dunlop & Co. at the time of the dissolution of the firm of John Laird & Son, is properly chargeable upon the joint estate of that firm; and that, if the joint effects are insufficient, James Dunlop & Co. may resort to the separate estates of the surviving, and of the deceased partner; and that the exception to the auditor's report, to that extent, is supported; and as to the £787 15s. 9d., being the amount overdrawn by Mr. W. Laird upon the tobacco of John Laird & Son, shipped after the death of Mr. John Laird, the exception is overruled; and the auditor will reform his report and statement of the accounts accordingly.

NEGRO WILLIAM RICHARDSON'S CASE.

A warrant of commitment of a person as a runaway is not sufficient unless it states on its face that the party has been convicted of being a runaway servant or slave. It is not sufficient to state in the warrant that the party is "charged with being a runaway."

Quære, whether the old laws of Maryland respecting runaways, are applicable to this part of the District of Columbia.

UPON the return of a writ of *habeas corpus*, issued by order of the Court, it appeared that the prisoner, William Richardson, a colored man, was committed by a warrant, issued by a justice of the peace, directed to the marshal, stating that whereas, F. B., a constable, had apprehended and brought before him, Negro William Richardson, "charged with being a runaway; and whereas no proof has been adduced before me that the said William Richardson is not a runaway; you are hereby commanded to receive into your jail and custody the said William Richardson and him safe keep until he be thence delivered by due course of law."

Mr. Carlisle, for the prisoner, suggested that the old statutes of Maryland were not applicable to this part of the district, nor to the present state of society. They were in general applicable to classes of servants which do not exist in this county, namely, imported white servants "by indenture, or according to the custom of the country." The only statute of Maryland, authorizing the commitment of runaway servants or slaves to the county jail, is the Act of 1615, c. 44, entitled "An Act relating to servants and slaves;" which, in its preamble, says, "Whereas there have been several acts provided against servants, runaways, which have hereto proved ineffectual, in regard they do not sufficiently provide encouragement for such person or persons, inhabitants of this province, as should seize such runaways, or servants, by this act deemed runaways. Therefore, for the better discovery, seizing, and apprehending such runaways,

"Be it enacted," &c., "That from and after the publication hereof, no servant or servants whatsoever, within this province, whether by indenture, or according to the custom of the country, or hired for wages, shall travel, by land or water, ten miles from the house of his, her, or their master, mistress, or dame, without a note under their hands, or under the hand of his or their overseer, if any be, under the penalty of being taken for a runaway, and to suffer such penalties as are hereafter provided against runaways."

This first section, it is evident, is applicable only to servants, as distinguished from slaves. Before a person can be convicted under this section of being a runaway, it must be proved that he

is a servant, either "by indenture," "or according to the custom of the country," "or hired for wages." And his master or mistress, and the residence of such master or mistress, must be known, and it must be proved that the servant was found travelling ten miles from the house of such master or mistress. If these things are not proved, the person cannot be convicted of being a runaway; and if not convicted, he cannot be committed as a runaway.

The penalties provided against runaways, by the 2d section of the act, are only applicable to servants whose term of servitude may expire; for they are to make "satisfaction by servitude or otherwise," "not exceeding ten days' service for any one days' absence," "after the expiration of such servant's first time of servitude by indenture or otherwise."

The 3d and 4th sections enact penalties against persons for entertaining or harboring such servants or slaves.

The 5th section says: "For the better discovery of runaways, it is hereby further enacted," &c., "That any person or persons whatsoever within this province, travelling out of the county where he, she, or they, shall reside or live, without a pass under the seal of the said county," "such person or persons, if apprehended, not being sufficiently known, or able to give a good account of themselves, shall be left to the discretion and judgment of such magistrate or magistrates before whom such person or persons as aforesaid shall be brought, to judge thereof; and if, before such magistrate, such person or persons, so taken up, shall be deemed and taken as a runaway or runaways, he, she, or they shall suffer such fines and penalties as are hereby provided against runaways."

The offence created by this section, is, travelling out of the county where the person resides, without a pass under the seal of the county.

As there is but one county in this district, subject to the Maryland laws, it is evident that no person, in the district, subject to those laws, can possibly be found travelling out of his county. This 5th section, therefore, is clearly not applicable to this part of the district. But if it were, the magistrate before whom the supposed runaway is brought, is to judge thereof; that is, whether he is a runaway or not; and if he shall convict him of being a runaway, he must also decide who is his master, to whom the satisfaction is to be made, and the amount of the satisfaction; and having so decided and adjudged, he is then (by the 8th section of the act,) authorized to take the runaway "into custody or otherwise him, her, or them to secure and dispose of as he shall think fit, until such person or persons, so seized and apprehended, shall give good and sufficient security to answer the premises at the

next court that shall first ensue in the said county ; which court shall secure such person or persons, till he or they can make satisfaction to the party that so apprehend or seize such runaways or other persons, as by this act is required ; except such person shall make satisfaction as aforesaid, before such court shall happen."

The "premises" which he is to answer at the next court, are the two hundred pounds of tobacco, which, by the 6th section, he is to pay for his own apprehension, whether convicted or not, of being a runaway.

The 6th section is as follows: "And for the better encouragement of all persons to seize and take up such runaways, it is hereby further enacted," &c., "That all and every such person and persons as aforesaid, seizing or taking up such runaways travelling without passes as aforesaid, not being able to give a sufficient account of themselves as aforesaid, shall have and receive two hundred pounds of tobacco, to be paid by the owner of such runaway servant, negro, or slave, so apprehended and taken up; and if such suspected runaway or runaways be not servants, and refuse to pay the same, he, she, or they shall make satisfaction by servitude, or otherwise, as the justices of the provincial and county courts, where such person shall be so apprehended and taken up, shall think fit."

The 7th section offers a reward to the neighboring Indians, for taking up runaway servants or slaves.

By the 8th section it is further enacted as follows: "And that notice may be conveniently given to the master, mistress, dame, or overseer, of runaways taken up as aforesaid, the commissioners of the counties shall forthwith cause a note of the runaway's name so seized and apprehended as aforesaid, to be set up at the next adjacent county courts, and at the Provincial Court and Secretary's office, that all persons may view the same, and see where such their servants are, and in whose custody."

It is evident that this part of the section is not applicable to this county; as there are no adjacent county courts under the same jurisdiction and subject to the same law. Nor is there any provincial court, or secretary's office, at which the notice could be set up; nor any commissioners to set it up.

It is evident that the provisions of this section are only applicable to servants, and not to slaves. All the penalties against runaways, are only applicable to servants. The courts and the magistrates can only convict servants. There are no penalties against slaves. The master alone has the power to inflict penalties and pains on his slaves for running away; and the laws give him no authority to use the public jails for confining his slaves.

The 35th section, which limits the time of imprisonment of

persons committed as runaways, to six months, is only applicable to white persons ; and within the six months, although they may prove that they are not servants, and therefore never were runaways, yet they cannot be discharged without paying to the sheriff or jailor, ten pounds of tobacco for every day's imprisonment, and two hundred pounds of tobacco to the person who apprehended them. But the provisions of this section do not include colored persons.

Color is said to be *primâ facie* evidence of slavery. But it is not evidence of temporary servitude ; and therefore does not bring the case of colored persons within the provisions of the acts respecting runaway servants. The Act of 1719, c. 2, affords a strong inference that no person was to be committed as a runaway servant or slave, unless his master was known, and he was convicted of being the servant or slave of such known master ; for it relates only to those servants and slaves whose masters or owners have had a month's notice of the commitment, if living within the province, or two months' notice if living in any of the neighboring provinces ; in which case, if such master or owner do not appear within the time limited and pay, or secure to be paid, the imprisonment fees, and such other charges as have accrued or become due to any person for taking up such runaway servant or slave, the sheriff is required to give notice of the time and place of sale, by setting up notices at the church and court-house doors of the county ; and to proceed to sell to the highest bidder, and to pay himself his imprisonment fees, and such other charges, and shall be accountable to the master or owner only for the surplus.

This act, therefore, does not affect the present case, further than it tends to show that no person can be convicted of being a runaway, whose master is not known or ascertained.

The only other act relating to the subject is the Act of 1792, c. 72, entitled "An Act to restrain the ill practices of sheriffs, and to direct their conduct respecting runaways."

It says : "Whereas it is represented to this general assembly, that the sheriffs of the respective counties have neglected to advertise runaways, to the great injury of the owners ; therefore,

"2. Be it enacted, &c., That it be the duty of the respective sheriffs, and they are hereby required and directed, upon any runaway being committed to their custody, to cause the same to be advertised in some public newspaper within twenty days after such commitment, and to make particular and minute description of the person, clothes, and any bodily marks, of such runaway."

"3. And be it enacted, That if no person shall apply for such runaway within the space of thirty days from such commitment,

then it shall be the duty of such sheriff, if residing on the western shore, to cause the said runaway to be advertised, as heretofore directed, in the Maryland Journal and Georgetown Weekly Leger, and if residing on the eastern shore, to cause the same to be advertised in the Maryland Herald and Maryland Journal, within sixty days from such commitment, and to continue the same therein until the said runaway is released in due course of law."

"4. And be it enacted, That if any sheriff shall refuse or neglect to comply with the directions of this act, he shall, for every such refusal or neglect, forfeit and pay the sum of twenty pounds current money, to the owner of such runaway."

This act, so far as it requires the advertisement to be in particular papers, is not applicable to this district; and no penalty can be recovered of the sheriff unless the person committed is actually a runaway, and the owner ascertained; thereby affording another strong inference that no person can properly be committed as a runaway unless his master or owner is ascertained.

The running away of a servant from his master is by the statute made a criminal offence, and, like all other criminal offences, must be strictly proved by competent evidence. And by the Constitution of the United States, (Amendments, art. 4,) "The right of the people to be secure in their persons," "against unreasonable seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing" "the person" "to be seized."

Here the prisoner has been committed under a warrant issued without any probable cause supported by oath or affirmation, and containing no charge of any offence. It only charges that the prisoner was brought before him "charged with being a runaway." It does not appear that the magistrate exercised his own judgment at all, or that he made any inquiry as to the fact of the prisoner's having run away from any master; or that he examined any person upon oath.

The statute imposes upon the justice, expressly, the duty of judging whether the person apprehended is "to be deemed and taken as a runaway." It is the duty of the magistrate diligently to inquire into the facts. The presumption arising from color may be rebutted by many circumstances; and the magistrate ought to be satisfied that the person has a master and that he has run away from him, before he deprives him of his liberty. The warrant does not state that he was thus satisfied.

Upon these grounds *Mr. Carlisle* contended that the prisoner ought to be discharged.

But he also produced evidence which satisfied the Court that the prisoner was born free in New Brunswick.

Holmead v. Smith.

Mr. Carlisle cited *The King v. Rhodes*, 4 T. R. 220, upon the English Vagrant Act of 17 Geo. 2, c. 5, that there must be a conviction to justify the commitment; and *The King v. Cooper*, 6 T. R. 509; S. P. 5 Burr. 2684, S. P.; and 6 Petersdorf, 231, tit. Conviction, that a conviction must strictly conform to the statute.

MORSELL, J., said that he had strong doubts whether the Maryland laws respecting runaways were applicable to this district; but that, at all events, the warrant of commitment was insufficient to justify the detention of the prisoner.

CRANCH, C. J., was also of opinion that the commitment was not sufficient, as it did not state any conviction by the justice, or even an opinion that the prisoner was a runaway; but a mere assertion that he was charged as a runaway; and said that the magistrate is bound to examine the case, and be satisfied by competent evidence on oath that the person is a runaway.

He gave no opinion upon the question whether the Maryland laws upon this subject were applicable to this county.

The COURT (THRUSTON, J., absent,) ordered the prisoner to be discharged, because the warrant of commitment was insufficient, and because they were satisfied that he was not a runaway.

ANTHONY HOLMEAD v. ANN W. SMITH *et al.*

The Circuit Court of the District of Columbia has jurisdiction to issue a *certiorari* to a justice of the peace in a case of forcible entry and detainer; and in vacation the writ may be ordered by one of the judges. Bond and security must be given to answer for costs.

An inquisition, describing the property as "one tenement or storehouse with the appurtenances, in the county aforesaid," is too vague and uncertain, and will be quashed."

CERTIORARI to a justice of the peace to send up the record in a case of forcible entry and detainer.

The petition of Anthony Holmead for the *certiorari*, on the 17th of November, 1837, addressed to the Court in vacation, was presented to the chief judge. It stated that Clement T. Coote, a justice of the peace for the county of Washington, had, at the instance of Ann W. Smith and others, her confederates, issued his warrant, a copy of which was annexed, upon which a jury of twenty-four had found a pretended inquisition, a copy of which was also annexed; and that the justice was about to issue an order or warrant of restitution; and that the marshal had notified that he would turn out of the property whoever should be found therein; that one John B. Holmead, in behalf of one William Dougherty, had rented the premises by agreement with Ann W.

Smith's agent, one Richard C. Briscoe, the said John B. Holmead, being at that time lawfully in possession thereof, under an agreement with Briscoe, for one month. That Dougherty, by the said John B. Holmead, his agent, took possession under the agreement with Briscoe, and moved his goods into the same, and has been peaceably selling his goods therein by his said agent, until the proceedings instituted against him in the present case.

That the justice has no jurisdiction in the case. That the petitioner, Anthony Holmead, has no concern whatever, or interest in, or possession of, the premises. That he has had no notice of the taking of the inquisition, and no opportunity to traverse the same. That their motive for making him a defendant, instead of John B. Holmead, was to get rid of his testimony respecting the agreement between John B. Holmead, in behalf of William Dougherty, and R. C. Briscoe, the agent of Mrs. Smith. To this petition was appended an affidavit by the petitioner of the truth of the facts stated in the petition.

At the foot of the petition was the following order: "Upon filing this petition, and the bond of the petitioner to the United States, in the penalty of \$200, with security to be approved by a judge of this Court, conditioned to pay all such costs as may be awarded by the Court against the said petitioner, in case he should fail to prosecute the writ of *certiorari* with effect, let the writ of *certiorari* issue as prayed. W. CRANCH, C. J.," &c.

"17th November, 1837."

The writ was issued to the justice commanding him "to send, under his seal, the record of the proceedings aforesaid, with all things touching the same," "in as full and ample manner as it now remains before you, together with this writ."

The record stated, in substance, that complaint had been made to the justice that Anthony Holmead, on the 10th of November, 1837, had forcibly entered into "the storehouse on lot numbered three, in square No. 432, in Washington City, in the District of Columbia, late in the occupancy of Benjamin S. Baily," of which Ann W. Smith, late of said county, was then seized in her *demesne* as of fee, against the form of the statute in such case made and provided. Whereupon the justice issued his warrant to the marshal, reciting the complaint aforesaid, and commanding him to summon and cause to come before him (the justice) at the premises, the said storehouse, immediately, twenty-four sufficient, lawful, and indifferent persons, dwelling near about the said tenement, so forcibly entered into and detained as aforesaid, to inquire," &c.

The inquisition, signed by thirteen of the jurors, stated, "that Ann W. Smith, of the said county, on the 10th of November,

1837, was seized in her *demesne* as of fee of and in one tenement or store-house, with the appurtenances in the county aforesaid; and that whilst the said Ann W. Smith was seized thereof, on the same 10th day of November, one Anthony Holmead, of said county, with force and arms, to wit, with a strong hand, did make a forcible entry into the said tenement, or storehouse and premises, then being in the seizin and possession of the said Ann W. Smith, and did, then and there, with force and arms, and with strong hand, unlawfully disseize the said Ann W. Smith thereof, and then and there, with force and arms, and a strong hand, did unlawfully expel and eject," &c., "against the statute," &c. The inquisition had no reference to the description of the property in the warrant.

Upon the return of the *certiorari*, *Mr. R. J. Brent*, for the petitioner, moved the Court to quash the inquisition, because it does not describe the property with sufficient certainty; the only description is, "one tenement or storehouse, with the appurtenances, in the county aforesaid." 4 Com. Dig. tit. Forcible Entry, D. 4, note (a); 2 Roll. Ab. 86; Indictment, M. pl. 4, 5, 6, 7; Russell, 493; *Gill's case*, 1 Roll. Rep. 334. "Gill was presented for forcible entry into a messuage or tenement; and this was quashed, because messuage or tenement is not good; and Coke said he had quashed divers such presentments, in his time, for this exception." *Ellis's case*, Cro. Jac. 633; S. C., Palmer, 277; *The King v. Sutton*, 2 Keb. 671.

Mr Hoban, *contra*, contended that this Court could only issue a *certiorari* in a case where the justice had usurped an original jurisdiction belonging to this Court; as in the case of *Gorman v. Kennedy*, in this Court at November term, 1833, (4 Cranch, C. C. p. 347.)

CRANCH, C. J., said that this Court had entertained jurisdiction, by *certiorari*, in forcible entry and detainer in several cases, and referred to the case of *United States v. Donahoo*, in this Court, at December term, 1807 (1 Cranch, C. C. 474); and the case of the *Lord Proprietor v. Brown et al.* 1 Har. & McHenry, 428.

The COURT (THRUSTON, J., absent,) quashed the inquisition for uncertainty in the description of the property. "Tenement or storehouse" is too vague.

REMINGTON v. LINTHICUM & HUNTER.

If the marshal takes the goods of a tenant in execution, and before he removes them, the landlord distrains them for rent; and the marshal then removes them from the premises, without paying a year's rent to the landlord who then replevies them, the

Remington v. Linthicum & Hunter.

Court will, on motion of the defendant, at the return of the writ, order the goods to be returned to the defendant, upon giving a sufficient bond to return them, &c. The return, in such case, is a matter of course, unless the Court should be satisfied that the defendant obtained possession of the property by force or fraud; or that the possession being first in the plaintiff, was got or retained by the defendant, without proper authority or right derived from the plaintiff.

REPLEVIN, returnable at the present term.

Mr. Marbury, for the defendants, moved for a return of the property upon giving the usual *retorno habendo* bond.

The circumstances of the case were these: The defendant, Hunter, the marshal, levied an execution in favor of Linthicum, the other defendant, upon the goods of one Offutt, who was tenant, and owed rent to the plaintiff, Remington. After the goods were seized in execution by the marshal, the plaintiff, Remington, the landlord, distrained the same goods for his rent. The marshal, without paying the rent, removed the goods to the house of the defendant, Linthicum, where Remington, the plaintiff in the present suit, replevied them. At the return of the writ, Mr. Marbury moved for a return of the property, upon giving the usual bond; and contended that by the levy of the goods under the *fieri facias*, they were in the custody of the law, and the plaintiff could not lawfully distrain or replevy them. Comyn on Landlord and Tenant, 386, 387; his only remedy being an action or a motion against the marshal for removing the goods, without paying one year's rent. Comyn on Landlord and Tenant, 395, 396.

But the question now is, not whether the marshal had a right to levy the execution upon the goods of the tenant, and to remove them without paying the rent, but whether the defendant has not the common right to a return of the property upon giving the usual bond.

The Act of Maryland of 1785, c. 80, § 14, authorizes the Court to refuse a return only in cases where the defendant has obtained the possession by fraud or force; or where the possession, being first in the plaintiff, was got or retained by the defendant, without proper authority or right derived from the plaintiff. In the present case, the defendant did not obtain the possession by force or fraud, and the plaintiff was not first in possession; the Court, therefore, is not, by that statute, authorized to refuse a return of the property upon the usual bond.

Before the statute of 8 Anne, c. 14, the landlord could not distrain goods taken in execution, because they were in *custodiâ legis*; and that statute does not give him any such right; it only forbids the sheriff to remove the goods before the rent is paid; and authorizes him to levy the money paid for rent, as well as the execution money.

Messrs. Brent & Brent, contrà, cited *Arnet v. Garnett*, 3 B. & A. 440, and contended that the landlord is not confined to his action on the case against the marshal for removing the goods without paying the rent. He had a right to distrain them before they were removed. The statute expressly declares that the goods shall not be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the execution is sued out, shall pay the rent before removal of the goods from the premises.

The goods therefore could not be taken by the marshal, and were not in *custodiâ legis*, when the plaintiff levied his distress. By that distress he had a qualified property in the goods, which will maintain his replevin. *Henchett v. Kimpson*, 2 Wilson, 140 ; *Comyn on Landlord and Tenant*, 396.

The COURT (THRUSTON, J., absent,) ordered a return of the property upon the usual bond being given.

UNITED STATES v. JOSEPH BENNER.

If a person hires a bar-room and fixtures and occupies part of the house, and keeps his bar-room open at all days and hours, and on Sundays and other days for the sale of spirituous liquors to other persons than boarders and lodgers, and allows such liquors to be drank in the said bar-room at such days and times ; the keeping of such a bar-room and house is a nuisance, and will support an indictment for keeping a disorderly house. *Quære?*

INDICTMENT, charging that the defendant kept a certain unlawful, disorderly, and ill-governed house as a common tavern, without license, and as a common tippling-house, and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drank by such persons in and about the said house, at all times both at day and at night, and on all days, both Sundays and other days, and did permit certain idle and ill-disposed persons, to the jurors unknown, to assemble in his said house then and there to continue drinking and tippling, to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals, and against the peace and government of the United States.

Upon the trial, *Mr. Key*, for the United States, moved the Court to instruct the jury, "That if they believe, from the evidence, that the traverser hired of the person who had kept the house before, the bar-room and fixtures, and that he occupied a part of the house, and kept the bar-room open at all days and hours, and on Sundays, as on other days, for the sale of spirituous liquors to other persons than boarders and lodgers, and allowed the said

United States v. Richardson.

liquors to be drank in the said bar-room, at such days and times ; then such keeping said bar-room and house is a nuisance, and the traverser, if the jury should be satisfied that he so kept said house and bar-room, is guilty under the indictment.

Mr. Morfit, contra, cited 6 Wheeler, 9, tit. Nuisance.

MORSELL, J., was of opinion that the instruction ought to be given.

CRANCH, C. J., had strong doubts ; but agreed to give it, and leave the defendant to move for a new trial if the verdict should be against him.

The COURT, therefore (THRUSTON, J., absent,) gave the instruction as moved by *Mr. Key*.

Verdict, not guilty.

 UNITED STATES v. ALLISON RICHARDSON.

If a man raise a club over the head of a woman within striking distance, and threaten to strike her if she opened her mouth ; this is an assault in law. He had no right to impose such a condition.

INDICTMENT for an assault upon one Susan Shelton.

The evidence was that the defendant came into the house where Mrs. Shelton was sitting at a window. He was armed with a musket, and a club ; and raising the club over her head, in an attitude for striking, and within striking distance, said to her that if she said a word (or if she opened her mouth) he would strike her ; and this without any provocation on her part.

Mr. Bradley and *Mr. Hoban*, for the defendant, contended that this was not, in law, an assault ; that there can be no assault without a present intent to strike ; and his saying, "if she opened her mouth," showed that he had not such a present intent ; and they cited the old case, "if it were not the assizes I would stab you."

But the COURT (THRUSTON, J., absent,) said that he had no right to restrain her from speaking ; and his language showed an intent to strike upon her violation of a condition which he had no right to impose. Suppose a stranger comes to my house armed, and raises his club over my head, within striking distance, and threatens to beat me unless I will go out of, and abandon my house ; surely that would be an assault. So if a highwayman puts a pistol to my breast, and threatens to shoot me unless I give him my money ; this would be evidence of an assault, and would be charged as such in the indictment.

Verdict, guilty ; fined ten dollars.

STEPHEN DUTILH's Administrator, with the will annexed, v. GREGOIRE COURSAULT, Administrator of Amable Coursault, Thomas Carinichael, Levi Woodbury, Secretary of the Treasury of the United States, and John Campbell, Treasurer of the United States.

The answer of a defendant in chancery, who has no personal knowledge of the facts he states, and whose conscience cannot be affected thereby, is not evidence in the cause, although responsive to the allegations in the bill. The only effect of such an answer, is, to present an issue and put the plaintiff to the proof of his allegations.

The commissioners under the French convention of July 4th, 1831, were authorized to make their award in favor of the person who was the legal and ostensible owner of the property seized, at the time of the seizure, and were not bound to ascertain the rights, and decide the litigations between conflicting claimants, citizens of the United States.

They might select that one whom they deemed best entitled, and award to him the portion of the indemnity applicable to the claim, and leave the others to settle their disputes before the ordinary tribunals of the country, adjudicating according to the municipal laws of the land; it is, therefore, unimportant whether any other citizen of the United States could or could not support an original claim to a part of the indemnity allowed; and no citizen of the United States could, by any judgment of the commissioners, be deprived of his right to resort to the ordinary tribunals of the country to establish his claim to participate in the sum awarded for the whole loss.

It is no objection to the intervening claim of a third person to a part of the fund awarded, that the original claimant, in making the oath required by the commissioners as a condition of receiving the claim, swore falsely, but not fraudulently; the third person not participating in the oath, nor in the motive of the person who made it.

Quære, whether the commissioners had authority to require such a preliminary oath?

In a contest between two litigants respecting a sum awarded by the commissioners, it is not necessary to make all the other claimants, under the convention, parties to the suit.

The party who receives the sum awarded for the whole claim, is a trustee for such as may be entitled to participate therein.

BILL in equity to recover from the administrator of Amable Coursault, one half of the amount awarded to him, under the French treaty or convention of July 4th, 1831, as indemnification for the seizure and confiscation of the Brig Triphena and cargo.

The bill states that on the 5th of October, 1809, Amable Coursault, a naturalized American citizen, residing in Philadelphia, having laden his brig Triphena, bound to Tonningen, sold and assigned to the plaintiff's testator, Stephen Dutilh, for a large and valuable consideration, a moiety of the said brig and cargo, before she sailed. That she sailed; put into Morlaix in France, and was there seized and sequestered by the French authorities. That Amable Coursault died, and the defendant Gregoire Coursault, his administrator, presented his claim for the whole loss, which was allowed by the commissioners, who awarded the sum of \$16,727.

That at or about the time of filing the claim by G. Coursault, it

was arranged between him and the plaintiff that it should be prosecuted in the name of the said G. Coursault; thus avoiding the expense and trouble of two memorials, and of two sets of proof, and that the plaintiff's right to a moiety thereof should be admitted. That the defendant Gregoire Coursault resides at Truxillo in Guatemala in Central America, and has left no agent or attorney empowered to receive the money awarded, and to pay the plaintiff his moiety.

It states a belief that Amable Coursault died insolvent, leaving many creditors, and that some of them are taking measures to obtain possession of the fund; and that a certain Thomas Carmichael, residing at Nantes in France, claiming to be a creditor of the said Amable Coursault, by his attorneys *Key* and *Dunlop*, applied to the Secretary of the Treasury to refrain from paying the money to the said Gregoire Coursault, and threatens to apply to this Court for an injunction. But the plaintiff does not admit that the said Thomas Carmichael is a creditor, nor that if he were, he is entitled to the possession of any part of the estate of his deceased debtor. The plaintiff only asks for his moiety of the award; and that the defendant Gregoire Coursault should be decreed to give him authority to receive it; and that the said parties may be enjoined from receiving the part belonging to the plaintiff; and that the Hon. Levi Woodbury, Secretary of the Treasury, and John Campbell, Treasurer of the United States, may be enjoined, &c.

"The joint and several answer of Thomas Carmichael, of Nantes, in France, surviving partner, &c., of the late house of Jacques Carmichael & Sons, by his attorney in fact, Thomas Dunlop, of Francis Key and James Dunlop, counsellors at law, (Gregoire Coursault, the other defendant, having departed this life since the filing of the said bill,) to the bill of complaint of Edmund G. Dutilh, administrator," &c.

These defendants, saving, &c., admit that Amable Coursault was owner of the brig and cargo, the sequestration by the French authorities, the claim by Gregoire Coursault, and the award No. 461.

They deny, that before the sailing of the vessel Amable Coursault sold to Stephen Dutilh a moiety of the vessel and cargo.

They deny, that when G. Coursault was about to present his claim to the commissioners he agreed with the plaintiff, in order to save the expense of two memorials, or for any other reason, that G. Coursault should present his claim exclusively in his own right, and subsequently share the amount awarded, with the plaintiff.

They aver, that Thomas Carmichael is an honest and *bonâ fide*

creditor of Amable Coursault to a greater amount than the whole sum awarded.

They set forth the Act of Congress of the 13th of July, 1832, marked B, authorizing the commissioners to make rules, and refer to the rules marked A, and to the oath taken by G. Coursault to his memorial, No. 461. They aver, that the plaintiff's interest in the claim was never made known to the commissioners; and that the whole award belongs to the estate of Amable Coursault, to be distributed by his administrator according to law.

The Secretary of the Treasury and the Treasurer of the United States have answered, That they are officers of the government of the United States, and not amenable to the jurisdiction of this Court as to the payment of moneys out of the Treasury of the United States, or any other of their official acts. They, therefore, plead and except to the jurisdiction of this Court in this case.

"These defendants, under the plea aforesaid and under protest of being bound by any injunction or order of this Court, do, however, answer and say, that awards have been made by the commissioners, as stated in the bill, &c.; and that the moneys to liquidate and pay the sums so awarded to the respective parties entitled to the same, are in the Treasury of the United States, and will be duly paid to the parties to whom it shall appear that the said moneys so awarded, are legally and equitably due."

The death of Gregoire Coursault on the 31st of January, 1837, having been averred in the answer of Mr. Dunlop, and stated in the deposition of James Matlack, and Mr. Elias Kane having taken out letters of administration *de bonis non* of the estate of Amable Coursault, the bill has been amended by making him a defendant in the place of Gregoire Coursault; and it is agreed by the counsel of the parties, that the answer of Mr. Dunlop shall be received and taken as the answer of Messrs. Key and Dunlop, and of Elias Kane, except that Mr. Kane does not admit, but denies, that Gabriel Paul ever qualified as executor or administrator of Edward Coursault; that a general replication be filed to all the answers, and that the cause be set for final hearing on the bill, answers, general replications, exhibits, and evidence.

The cause accordingly came on so to be heard, and was argued by Mr. R. S. Coxe, for the plaintiff, and by Mr. Key and Mr. Dunlop, for the defendants, on the 14th, 16th, 18th, and 19th December, 1837.

CRANCH, C. J., (THRUSTON, J., absent,) after stating the substance of the bill, answers, and evidence, delivered the opinion of the Court:

It is remarkable that not one of the defendants pretends to have personal knowledge of any of the material facts charged in the

bill ; and that the conscience of none of them can be affected, unless it be Mr. Kane, in denying the interest of the plaintiff in the brig *Triphena* and cargo ; consequently, neither the averments nor the denials of facts, contained in those answers, are evidence in the cause, (although responsive to the allegations of the bill,) except as to the fact that Mr. Carmichael is a creditor of the estate of Amable Coursault.

The only effect of such answers is, to present an issue and put the plaintiff to the proof of his allegations.

The most material fact denied by those answers, is the interest of the administrator of Stephen Dutilh in the brig and cargo, or in the sum awarded to Amable Coursault as indemnification for their loss.

They deny also the agreement between the plaintiff and Gregoire Coursault, that the claim should be presented in the name of the said Gregoire.

If these two facts are established, the plaintiff's right to the relief for which he asks will follow of course, unless he should be barred from that relief by his acquiescence in the oath taken by Gregoire Coursault, the administrator of Amable Coursault, on the 3d of January, 1833, in the affidavit annexed to the memorial received by the commissioners on the 30th of January in the same year. Or by reason of his having had a right to present his original claim to the commissioners, under the convention, and having failed so to present it.

The evidence of Mr. Dutilh's interest in the net proceeds of the adventure to Tonningen, is very satisfactory ; and the certificate of Mr. Gregoire Coursault, as administrator of the estate of Amable Coursault, on the 10th of January, 1833, at the foot of the account current of the latter with Mr. Stephen Dutilh, (marked B,) made after the claim was filed, is evidence that Mr. Dutilh, as against Gregoire Coursault, would be entitled to one half of the sum which should be awarded, and that Gregoire Coursault, as administrator of Amable Coursault, would become the trustee of the plaintiff for one half of the amount of the award, as soon as it should be received. Mr. Kane now stands in the place of Gregoire Coursault, and if he receives the amount of the award, he, also, will become trustee for the plaintiff in like manner ; and if he refuses to pay over one half of it to the plaintiff, the latter may have relief in equity, unless barred by some principle of law, or some rule in equity.

1. The first objection taken by the defendant's counsel to the plaintiff's right to relief in equity, is, that he had a clear legal remedy, which he was bound to pursue elsewhere ; that is, he was entitled to be an original claimant under the convention, whether

his title was legal or equitable; and that this is admitted by his bill where he says, that "at or about the time the said Gregoire as administrator filed and exhibited his said memorial and claim for said compensation as aforesaid, it was agreed between him and the plaintiff, that the claim should be prosecuted in the name of the said Gregoire, thus avoiding the expense and trouble of two memorials and sets of proof; and that the right of the plaintiff's testator should be admitted and recognized to the extent of the moiety of the same; and the plaintiff refers to the written acknowledgment of Gregoire Coursault at the foot of the account current marked B, and dated January 10, 1833, which speaks of the claim as already entered by him before the board of commissioners at Washington. The affidavit to the memorial is dated the 3d of January, 1833; and the commissioners on the 30th of January, 1833, so far acted upon the memorial, as to order it to be received; for, according to the rules of the board, no memorial could be received, unless it contained certain averments verified by affidavit. The argument is, that having had a right to be an original claimant before the commissioners, and not having exercised that right, he can have no remedy in equity.

In considering the validity of this objection, it may be well to inquire, what was the nature of the plaintiff's interest at the time of the filing of the claim by Gregoire Coursault as administrator of Amable Coursault?

It appears by the agreement of the 5th of October, 1809, between Amable Coursault and Stephen Dutilh, that Amable Coursault was the owner of the brig and cargo then bound to Tonnin-gen, consigned by Amable Coursault, to his brother Gregoire Coursault, who went out as supercargo. Of course the register of the brig must have been in the name of Amable Coursault, as well as all the invoices and ship's papers, all showing the proprietary interest to be in him alone. It is also to be inferred from the same agreement of the 5th of October, 1809, that the whole adventure was to be directed and managed by Mr. Coursault. That he and his supercargo were to transact the whole business, and that Mr. Dutilh was to take one half of the risk, and to receive from Mr. Coursault, to whom the returns were to be made, one half of the net proceeds of the voyage out and home; the legal title and proprietary interest in the brig and cargo still remaining in Mr. Coursault. There is no evidence of any delivery of possession of the property to Mr. Dutilh, nor of any act of ownership by him. For the chance of receiving one half of the net proceeds of the expedition, he was willing to pay the cost of one half of the outfit. Mr. Coursault's title to the vessel and cargo was good against all the world. Even Mr. Dutilh himself

could not touch it. His right was only a future and contingent right to one half of the net proceeds of the voyage. He could claim nothing until the voyage should be ended, and the proceeds received by Mr. Coursault. He had no legal property in the brig and cargo. He could not, either alone or jointly with Mr. Coursault, maintain trespass, or trover, or detain for the vessel and cargo, or any part of them. If he should bring either of those actions alone, the defendant would defeat him by showing the legal title in Mr. Coursault. If he should join with Mr. Coursault in bringing the suit, the defendant would also defeat them by denying the title of Mr. Dutilh. If Mr. Coursault had insured the vessel and cargo, and they had been lost by the perils of the sea, Mr. Dutilh could not have had direct recourse to the underwriters; he could only claim through Mr. Coursault, who upon receiving the money from them would be a trustee for Mr. Dutilh's moiety. Mr. Coursault alone had the right to represent the property in a foreign tribunal; and to him alone would the property have been restored, if restored at all; and if the vessel and cargo had been captured as prize of war, and he had been an enemy, and Mr. Dutilh a friend, Mr. Dutilh's contingent right to a moiety of the proceeds of the voyage would not, as we apprehend, have saved any portion of the property from condemnation. So when retribution is made for the property sequestered, it is to be made to the party who had the legal title, and who could give a legal and valid discharge.

Mr. Coursault, being the only person who could represent the property in the French tribunals, was the only proper person who could represent it before the commissioners. The indemnification awarded, stands in the place of the net proceeds of the voyage; and Mr. Dutilh's right to the moiety does not accrue until the indemnity comes into the hands, or is ready to be paid into the hands of the administrator of Amable Coursault, who, if he receives it, becomes a trustee for Mr. Dutilh as to his moiety.

In this view of the subject, I am by no means satisfied that Mr. Dutilh could have supported a claim for indemnity before the board of commissioners; nor that his competency to do so is so clear as to deprive him of his right to proceed in equity against his trustee.

If he had filed a claim before the commissioners, it must have been either in the name of the administrator of Amable Coursault, or jointly with him, or in his own name, stating his future interest in the sum to be awarded; in either of which cases, the proofs must have been the same, except so far as related to his interest in the net proceeds of the voyage, or in the amount which should be awarded. In either case, the disclosure of his

interest could not in any manner alter the nature of the claim, as between the United States and France, or in any manner affect its validity. All that the commissioners were to ascertain, was, whether it was such a claim as was provided for by the convention, namely, whether it was a *bonâ fide* claim by citizens of the United States upon the French government, for such spoliations as were provided for by the convention of July 4, 1831. This being ascertained, the commissioners were not bound to ascertain the rights of, and decide the litigations between conflicting claimants, citizens of the United States. They might select that one whom they deemed best entitled, and award to him the portion of the indemnity applicable to the claim, and leave the others to settle their disputes before the ordinary tribunals of the country, adjudicating according to the municipal laws of the land.

If Mr. Dutilh had filed an original claim, the commissioners might have said to him, Mr. Coursault has exhibited to us a clear legal title to the whole of the property; all the documentary evidence is in his name. You have suffered the voyage to be prosecuted entirely in his name; you admit his legal title; you are both citizens of the United States. It is a clear and valid claim under the convention, whether it belongs to one or the other, or to both jointly. We have no jurisdiction to decide between you. We shall be safe in awarding the indemnity to him who has the legal title, and we leave you to settle your conflicting claims in the ordinary courts of the country. This might have been the result if Mr. Dutilh had filed an original claim before the commissioners, and after he had been at the trouble and expense of filing a memorial and prosecuting the claim; whereas his object would be just as well accomplished by obtaining Mr. Gregoire Coursault's admission of his right to a moiety of whatever sum the commissioners might award.

But whether Mr. Dutilh could or could not have supported an original claim before the board of commissioners, we deem a question of little importance, because the right of the commissioners to award the whole to Mr. Coursault is unquestionable, leaving all other citizens of the United States, having a right to participate in the amount thus awarded, to their remedy against Mr. Coursault, in the ordinary courts of justice. And the commissioners had no power to deprive them of that remedy.

Admitting that Mr. Dutilh might have made and supported a separate and original claim before the commissioners, he was not bound to do so. His omission has no effect whatever upon the other claimants; nor upon the interests of the United States, or of France. His claim would not have been a claim at law, nor would his remedy have been a remedy at law as contradistinguished from equity, so as to be a bar to equitable relief.

The principle, that no decision of the board of commissioners under the French convention is conclusive between conflicting claimants, citizens of the United States, was decided by this Court in the case of *Ridgway v. Hays* and others, at November term, 1836, (*ante*, 23.) In the opinion of the Court in that case, it is said: "It has been contended that the decision of the board of commissioners, rejecting the claim of Mr. Ridgway, is conclusive against him. To this there are two objections. First, that the commissioners had no jurisdiction to decide ultimately between two or more conflicting American claimants."

The Act of Congress of July 13, 1832, [4 Stat. at Large, 574,] authorizing the appointment of the commissioners, declares their duties to be "to receive and examine all claims which may be presented to them under the convention," "and which are provided for by the said convention, according to the provisions of the same, and the principles of justice and equity and the law of nations;" "and to report to the Secretary of State a list of the several awards made by them."

It appears, by the first article of the convention, that the claims which the commissioners were to examine and report upon, were, "the reclamations preferred against it," (the French government,) "by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property."

"The claims, of which the board had cognizance, were claims against the French government; not against the owners of the property claimed, nor against the property itself. In each case, the great question for them to decide was, whether the property of American citizens had been unlawfully seized, &c., by the French government. So far as it was necessary to decide the national character of the property seized, they had authority to ascertain the legal owner; but if all the conflicting claimants were citizens of the United States, there was no necessity of their deciding the question of ownership between them. They might select the name of the person who seemed to them to be the legal owner; or they might name all the conflicting claimants, and leave them to litigate their rights in the municipal courts of the country; or they might award in favor of 'the legal owners,' without naming them; as they did in several cases, as will appear by reference to the list of awards returned by them to the Secretary of State. (See the printed documents of the House of Representatives, No. 117, of the First Session of the 24th Congress.)"

This opinion is in accordance with that of the commissioners under the treaty with Spain, (commonly called the Florida Treaty,) as stated in the case of *Sheppard et al. v. Taylor*, 5 Peters, 655,

from their final report to the Department of State on the 8th of June, 1824, where they say: "But in these and many other cases which occurred, the board, having ascertained the full amount of the loss, distributed this amount, so ascertained, amongst the different parties claiming it before them, and seeming to have a right to receive it, no matter in what character, without deciding, or believing itself possessed of the authority to decide, upon the merits of conflicting claims to the same subject. To whom, of right, the sum thus awarded, when paid, may belong, or for whom, how, or in what degree, the receiver ought to be regarded as a trustee of the sum received, were questions depending upon the municipal laws of the different States of the Union, the application of which to the facts existing in any case, the board did not feel itself authorized to make; and, therefore, abstained from instituting any inquiry as to the facts necessary to such a decision."

It may be remarked, here, that the powers given to the commissioners under the Florida treaty, are broader than those given to the commissioners under the French convention. The words of the Florida treaty are: "To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the President, by and with the consent of the Senate; which commission shall meet at the city of Washington, and within the space of three years from the time of their first meeting, shall receive, examine, and decide upon, the amount and validity of all the claims included within the description above-mentioned." "The said commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties, of the 27th of October, 1795; the said documents to be specified, when demanded, at the instance of the said commissioners."

The act of Congress, authorizing the appointment of these commissioners, neither adds to, nor diminishes their powers.

The French convention does not, like the Florida treaty, provide expressly for a board of commissioners, but only provides that the indemnity to be paid by the French government to the government of the United States, shall be distributed, by the latter, among those entitled, in the manner and according to the rules which it shall determine. By the sixth article, the two governments reciprocally engage to communicate to each other the documents,

titles, and other information proper to facilitate the examination and liquidation of the reclamations comprised in the stipulations of that convention.

The Act of Congress of the 13th of July, 1832, "to carry into effect the convention," authorizes the President, with the advice and consent of the Senate, to appoint "three commissioners, who shall form a board, whose duty it shall be to receive and examine all claims which may be presented to them under the convention," "which are provided for under the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." And by the second section of the act they are authorized to make "all needful rules and regulations," "for carrying their said commission into full and complete effect." And by the sixth section they are required to "report to the Secretary of State a list of the several awards made by them."

By a comparison of the powers of the respective boards it appears, that the commissioners under the Spanish treaty are authorized, not simply, as the other commissioners are, "to receive and examine" the claims, "according to the principles of justice, equity, and the law of nations," and send a list of their awards to the Secretary of State; but "to receive, examine, and decide upon, not merely the claims, but the amount and validity of the claims; and further, "to hear and examine on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same," and "for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty" of 1795.

Yet with all these powers, so far transcending those given to the commissioners under the French convention, the commissioners under the Florida treaty did not believe themselves "possessed of the authority to decide upon the merits of conflicting claims to the same subject." If their construction of their own authority was correct, *a fortiori* are we correct in denying the supposed power to the commissioners under the French convention?

But we are further fortified in our opinion respecting the powers of the commissioners under that convention by the opinion of the Circuit Court of the United States for the District of Pennsylvania, as delivered by the late Mr. Justice Washington in the case of *Vasse v. Comegys*, 4 Wash. C. C. Rep. 570, and by the opinion of the Supreme Court of the United States as delivered by Mr. Justice Story in the same cause. 1 Peters, 211, 212.

In the Circuit Court, Mr. Justice Washington said: "It is to be preliminarily observed, that the case does not state in whose favor the award of the commissioners was made, or who were the parties that presented themselves before the commissioners as the

claimants of this money. All the Court can know is that the money was paid to the defendants by the Treasury of the United States; but in the view which I shall take of this case, I deem it immaterial who were the claimants, or in whose favor the award, or sentence, was given, if given in favor of any particular person or persons. The treaty described the duties and the jurisdiction of the board of commissioners, and, of course, it was essentially the guide of that tribunal, as it must be of this. I admit, at once, that the decisions of that board, upon every subject within the scope of its authority, and to the utmost extent of its jurisdiction, are binding and conclusive upon this, and upon every other judicial body. It was constituted by a treaty, and its decisions are entitled to the same sanctity as those of tribunals constituted by the Constitution or by the ordinary acts of legislation; beyond this they have no binding force. What, then, were the duties of those commissioners, and what the extent of their jurisdiction? By the eleventh section of the treaty they are to receive, examine, and decide upon the amount and the validity of all the claims which the United States had consented, by the ninth article, to renounce, as well on the part of the government as of citizens of the United States. The extent, then, of the jurisdiction of this board was to decide upon the amount and validity of the claims which might be presented to it on account of the enumerated losses and injuries. It had no cognizance of any other claims; and their inquiries and decisions were strictly confined to the validity and amount of such as they had cognizance of. They had no authority to decide, and we presume that in no instance did they decide, upon the rights of conflicting claims, or of hostile claimants. They did not possess the ordinary means for engaging in investigations of that nature; nor was it consistent with the objects of the treaty, or the interest of the claimants that such questions should be litigated before a tribunal so constituted. It necessarily belongs to the ordinary tribunals of the country to decide who is entitled to the money thus awarded by the commissioners to be paid to the United States because they alone possess the means of examining and settling the innumerable questions to which such controversies may give rise."

"But even, if the jurisdiction of the board of commissioners, in the present case, had extended to the decision of conflicting claims, it is by no means admitted that their award would be conclusive in this suit; unless it appeared that the plaintiff was before the commissioners to submit his claim to their examination and decision. For, although the decision of the board in favor of the assignees, the defendants, would be so far conclusive as to protect the Treasury of the United States against a double payment; yet

if, in point of law, the money ought to have been paid, not to the assignees, but to the plaintiff, it was so much money received by the former to the use of the latter, and would be recoverable in this form of action."

And in delivering the opinion of the Supreme Court of the United States in the same cause, (1 Peters, 212,) Mr. Justice Story says :

"It has been justly remarked, in the opinion of the learned judge who decided this cause in the Circuit Court, that it does not appear, from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners ; nor whether Vasse himself was before the board ; nor who were the parties to whom, or for whose benefit the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reëxaminable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. An amount once fixed is the final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to this fund so awarded. The commissioners are to look to the original claim for damages or injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may in the intermediate time have devolved ; or who was the original legal, as contradistinguished from the equitable owner ; provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees, or personal representatives, or *bonâ fide* purchasers, was not necessary to be ascertained in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broad jurisdiction with due justice and effect. They had no authority to compel parties asserting conflicting interests, to appear and litigate before them ; nor to summon witnesses to establish or repel such interests ; and under such circumstances it cannot be presumed that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substan-

tial justice. The validity and amount of the claim being once ascertained by the award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of the parties. We are, therefore, of opinion that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners."

The principle upon which these opinions rest, was settled in England by Lord Chancellor Hardwicke, in the year 1748, in the case of *Randal v. Cockran*, 1 Ves. 98.

"The king having granted letters of reprisal on the Spaniards, for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim for part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers, who thereupon brought the present bill."

"Lord Chancellor was of opinion that the plaintiff had the plainest equity that could be. The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid. Although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them, their commission was limited in time. They see who was owner; nor was it material to them, to whom he assigned his interest, as it was, in effect, after satisfaction made."

Here, although the commissioners had rejected the claim of the underwriters, the Lord Chancellor decided that their claim was good in equity; that the commissioners did right not to entangle themselves in the disputes between the owners and the underwriters, and in awarding in favor of the owner, whose original right to indemnity was unquestionable.

This Court is further sustained in its opinion by that of Lord Chancellor Eldon in the case of *Hill v. Reardon*, 2 Russell, 608, which was a case under the treaty of _____ between England and France, in which the commissioners had awarded the whole indemnity to one Devereux, under whom the defendant Reardon claimed. Hill and others brought their bill in equity against Reardon, who had received the amount awarded. The plaintiffs in equity had never presented their claim to the commissioners, although the facts upon which their claim rested were brought

to the knowledge of the commissioners. Upon the hearing before the Vice Chancellor, in the year 1825, he decided that the award of the commissioners was final and conclusive against the plaintiffs, and dismissed their bill. Upon appeal to the Lord Chancellor, in 1827, he reversed the decision of the Vice-Chancellor upon that point, and said :

"The first question is, whether an award made in favor of A. B. by the commissioners acting under the conventions between France and this country, is not only to be conclusive as between the subjects of this country and the French government, but is also to destroy all demands in equity which third persons might have against A. B. if he had received the money otherwise than through the channel of such award. My opinion is, that the conventions and act of Parliament have no such effect."

"The conventions and act of Parliament, meant no more than this, that the decision of the commissioners should be conclusive between the two countries; and that the demand of an English subject, and a judgment in his favor, and a compliance with the judgment, would be a discharge of the government of France; but the equities with which any persons receiving money under the adjudication of the commissioners might be affected, were not at all touched by the conventions and the act."

The Lord Chancellor, however, being of opinion that the plaintiffs had not made out their equity, dismissed the bill; but without costs.

Thus supported, we still adhere to the opinion expressed by this Court, in the case of *Ridgway v. Hays*, and must say that the award of the whole indemnity to Mr. Coursault is no bar to Mr. Dutilh's remedy in equity against Mr. Coursault's administrator, if he has received the fund, or against any other person in whose hands it may be.

This we think a sufficient answer to the defendant's first objection, that the plaintiff had a legal remedy by claim before the commissioners, which he ought to have pursued.

2. The second objection to the plaintiff's relief in equity is, that Mr. Coursault, in order to comply with a rule made by the board as a condition of their receiving his claim, on the 3d of January, 1833, in an affidavit annexed to his memorial, made oath that the facts, circumstances, and allegations stated in the said memorial, so far as they had come within his own knowledge, were true as stated, and that those stated as derived from the knowledge of others, he believed to be true.

That the said memorial contains the following declaration, viz., "That no other person was at the time of the origin of this claim, nor has at any time since been, nor now is, interested in said

claim, or any part thereof, except the said Amable Coursault, and your memorialist, his administrator, as hereinbefore stated; and that, whatever amount of said claim may be awarded under said convention, will belong solely and exclusively to your memorialist, as administrator of the said Amable Coursault, deceased."

That the above declaration was false, as appears by the plaintiff's own statement in his bill, and that Gregoire Coursault, when he made the said affidavit, knew it to be false, as appears by his certificate, dated the 10th of January, 1833, written at the foot of the account current of Amable Coursault against Stephen Dutilh, in which he charges Mr. Dutilh with one half of the estimated value of the brig and outfit, and with one half of the cargo, and gives him credit for \$1,099.80 for logwood, and for his three notes, amounting to \$3,854.54 for the balance. In that certificate of the 10th of January, 1833, Mr. Gregoire Coursault says, "I do certify and declare, that to my knowledge the above is true, and that the estate of Mr. Stephen Dutilh, deceased, is interested of one half in the claim of the French, entered by me before the board of commissioners at Washington, for the whole amount of the Brig Triphena and cargo."

It seems, therefore, that the oath taken by Mr. Gregoire Coursault, on the 3d of January, 1833, must have been false.

It is also contended, that Mr. Dutilh, the present plaintiff, must have been conusant of that oath and assented to it, and must, therefore, be considered as a participator in its guilt, and must abide its consequences. That he is to be considered as *particeps criminis*. That no person can have a standing in a court of equity, whose claim rests upon an avowed violation of the law. And, to support this doctrine, the case of *Cambioso v. Maffitt* is cited from 2 Wash. C. C. Rep. 103. It was an issue sent by the commissioners of bankrupt to try the right of the executors of Cambioso to recover from the bankrupt a share of the net proceeds of sundry adventures carried on as joint owners, by Cambioso, an alien, and Maffitt, a citizen of the United States, in fraud of the revenue laws of the United States, Maffitt having obtained, in his own name, American registers for vessels owned jointly by him and Cambioso, thereby evading the payment of foreign duties; to obtain which registers, Maffitt must have taken a false oath.

Mr. Justice Washington, in his charge to the jury in that case, said: "The defendants insist that this claim cannot be enforced in the courts of the United States, because those courts cannot lend their aid to establish a demand founded on a violation of the laws of the United States.

"This principle of law may not, in a moral point of view, destroy the right of the plaintiff; but it goes to defeat his remedy in

the tribunals of this country. The soundness of the principle, as a general one, is acknowledged by the plaintiff's counsel ; but it is contended to be inapplicable to foreigners, who are not bound to take notice of the revenue laws of a foreign country, unless proof is brought home to them of a knowledge of those laws, or of every fact necessary to apprise them of the breach of them."

The judge, after giving his reasons at large for denying the supposed exception to the generality of the principle, said : " Upon the whole, then, it is clear, that if proof were necessary to be brought home to Cambioso, of his knowledge that these vessels had obtained the character of American vessels by a fraud upon the laws of the United States, such proof is furnished by the nature of the transactions themselves. But whether he had such knowledge in fact or not, the frauds were committed by his partner, or agent, by which he must be affected ; and as to the revenue laws themselves, he was bound to take notice of them.

"As to any goods which may have been imported in those vessels into this country, which were free of duties, they are subject to a different consideration. Such importation was not a violation of the revenue laws. As Cambioso gained nothing, and the United States lost nothing, by a concealment of his interest in those goods, or in the vessels, there was no such fraud as would vitiate his demand for any balance due on their account.

"It was contended that Cambioso, by sending to Maffitt documents representing the cargoes as belonging to Maffitt, enabled him to commit perjury in the oath which he took at entering them ; and that thus participating in this immorality, he ought not to recover. But it by no means appears that the oath taken by Maffitt, on entering such goods as his sole property, was even false, much less, that it was perjury. We do not observe that the oath, or any part of the law, requires that all the partners should be named. The object of the law is to insure the payment of duties ; and not to disclose the names of the owners of the property."

"But even admit that a false oath was taken by Maffitt, by means of the papers sent to him ; we do not see how this can affect the right of Cambioso to recover the value of these goods sold by Maffitt, for which he was justly indebted to Cambioso. Cambioso violated no law of the United States in concealing his name as part-owner of these goods."

Upon considering this case of Cambioso, it is evident that the foundation of the principle upon which it was decided, is fraud. The plaintiff was not permitted to recover, because his claim was founded in fraud ; not mere false swearing, from which no injury resulted or was intended. There was an actual fraud practised upon the United States by means of the false oath. An injury to

the United States was intended and actually perpetrated. The United States, by that oath, had been cheated out of a large amount of revenue; and Cambioso was completely *particeps criminis*, to the extent of the fraud intended, as well as of that actually perpetrated.

It is evident, also, that the principle applies only to cases of fraud. For if the false swearing alone was sufficient to prevent the plaintiff from recovering, the judge could not have said, in relation to the goods free of duties, imported in the same vessel respecting which the false and fraudulent oath was taken, that "there was no such fraud as would vitiate his demand for any balance due on their account." Nor could he have said, as he did, "But even admit that a false oath was taken by Maffitt, by means of the papers sent to him, we do not perceive how this can affect the right of Cambioso to recover the value of these goods sold by Maffitt, for which he was justly indebted to Cambioso. Cambioso violated no law of the United States in concealing his name as part-owner of these goods."

And why did he not violate a law of the United States in concealing his name as part-owner of those goods? Because it was immaterial to the United States whether the goods belonged to an alien, or to a citizen of the United States; for in either case they paid the same rate of duties as if imported in a vessel of the United States. The rate depended upon the character of the vessel, not that of the owner of the goods.

In order, therefore, to make this case like that of Cambioso and Maffitt, it must be shown that the claim of the plaintiff is founded in fraud. It must not only be shown that a false oath was taken by Coursault, but that it was taken with intent to defraud the United States, or some person, and that the plaintiff was a participant in that fraud. So far, however, from there being any evidence of a fraudulent intent on the part of Mr. Coursault or of Mr. Dutilh, in filing the claim in the name of Mr. Coursault alone, without disclosing the interest of Mr. Dutilh, and in the oath taken by Mr. Coursault, it is clear that the rights of no person, nor of the United States, would in any manner have been varied, if Mr. Coursault, in filing the claim, had disclosed the interest of Mr. Dutilh; or if Mr. Dutilh had filed a separate claim for his half of the indemnity. As both were citizens of the United States, and as Mr. Dutilh was not indebted to the United States, no possible motive, affecting the United States, or the other claimants, can be imagined for concealing the interest of Mr. Dutilh.

Whatever might have been the motive of Mr. Coursault in filing the claim in his own name and making the affidavit, there is no evidence that Mr. Dutilh participated in that motive; on the con-

trary, the presumption is that Mr. Coursault filed the claim in his own name alone without consulting Mr. Dutilh, and that Mr. Dutilh, hearing of the claim being thus filed on the 3d of July, applied to Mr. Coursault on the 10th to give him an acknowledgment of the interest of his testator's estate in the sum which should be awarded, which acknowledgment appears to have been readily given. There is no evidence upon which to charge Mr. Dutilh with bad faith towards the United States or the claimants under the convention, or with any evil intent or sinister design. The intention to save expense is not averred in the bill as the motive for suffering the claim to be filed by Mr. Coursault alone, but as a consequence of his thus filing it, and of Mr. Dutilh's subsequent assent upon receiving Mr. Coursault's acknowledgment that the estate of Mr. Stephen Dutilh was interested therein. The averment in the bill is not that they agreed that the claim should be filed in the name of Mr. Coursault alone, to save expense; but that it should be "prosecuted" in his name, "thereby avoiding the expense and trouble of two memorials and sets of proof."

The oath was not required by the law which designates the duties and the authority of the commissioners, nor by the convention. It was required only by a rule of the commissioners, as a condition, without which they would not receive and act on any memorial. It is by no means clear of doubt, whether the commissioners had authority to make such a rule; for the second section of the act, which authorizes them to make rules, only authorizes them to make rules "not contravening the laws of the land, the provisions of this act, or the provisions of the said convention;" and in the first section of the act, it is expressly declared to be the duty of the board, "to receive and examine all claims which may be presented to them under the convention, which are provided for by the convention, according to the provisions of the same."

But, admitting that they had a right to require such an oath, and that the oath taken was false, there is no evidence that it was taken with such a fraudulent intent as brings the claim, even of Mr. Coursault, within the principle which denies relief in the courts of the United States either at law or in equity. Much less is there any evidence which will justify an imputation to Mr. Dutilh of whatever of obloquy may be supposed to attach to Mr. Coursault, or of any portion of it. He comes into this Court with clean hands, and we think, has a right to relief in equity.

It was contended at the hearing, that as each claimant is interested in opposing all the others, so as to increase the fund, which is insufficient to pay all in full, all the other claimants should have been made parties in this cause.

But it is clear, that as the award of the commissioners in favor

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of Gregoire Coursault is conclusive as to the amount and validity of the claim, this litigation between him or the creditors of his intestate, Amable Coursault, and Mr. Dutilh, can have no effect whatever upon the general fund to be divided among the claimants, and that a decree in this cause can have no effect whatever upon the interests of the other claimants.

We have not noticed the objection to Mr. Carmichael's right to interfere in the litigation between Mr. Dutilh and the administrator of Amable Coursault. He was not a necessary party in this controversy. He can claim no greater rights than those which Mr. Amable Coursault could have claimed, if he had been a party; nor than those which his administrator can now claim.

Mr Dutilh's right to one moiety of the indemnity is clearly proved; and if Amable Coursault himself were now before the Court and had received the money, he would be a trustee to Mr. Dutilh for that moiety; and his administrator, who is now a party, if he receives the money, will be equally a trustee of that moiety for Mr. Dutilh.

This being the opinion of the Court upon the principal question in the cause, the counsel for the plaintiff will prepare the form of a decree for the consideration of the Court.

 UNITED STATES v. THOMAS SKAM.

An adopted child is not entitled to a pension. But an illegitimate female child, if her parents afterwards intermarry, and the husband acknowledge the child, becomes legitimated by the law of Maryland of 1786, c. 45, § 7, and entitled to a pension under the laws of the United States, if her father dies in the naval marine service of the United States, and the mother marries again.

The intermarriage, and the acknowledgment of the child by the husband, are *prima facie* evidence that he was the actual father of the child; and if he begot the child, it was not perjury in the witness to swear that the child was the legitimate heir and only child left by the deceased husband.

INDICTMENT for perjury. The perjury was assigned in a joint affidavit made by the defendant and one Jane Berkemer, who, in order to obtain from the United States a pension for one Mary Ann Thomas, as the child of one Orral T. Thomas, (a marine who died in the service of the United States,) made oath before a justice of the peace in Washington, that they are well acquainted with Mary Ann Thomas, and know her to be the legitimate heir and only child left by the said Thomas," whereas the defendant then and there knew and believed that the said Mary Ann Thomas was not the child of the said Orral T. Thomas.

By the Maryland law of 1786, c. 45, § 7, "If any man shall have one or more children by any woman whom he shall after-

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wards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated, and capable in law to inherit and transmit inheritance, as if born in wedlock."

Evidence was produced by the defendant that the said Orral T. Thomas married the mother about a year after the birth of the child, and received and maintained the child, and called her his child, and suffered her to call him father, and to be called by his name, namely, Mary Ann Thomas.

The COURT, upon the trial, (THRUSTON, J., absent,) at the motion of *Mr. Key*, the District Attorney, instructed the jury,

"That if they believe from the evidence, that Mary Ann Thomas, mentioned in the affidavit, was the child of Ann Alford, (the wife of the said Orral T. Thomas, and who after his death intermarried with one Alford); that said child was born about twelve months before her marriage with the said Orral T. Thomas; that the said Thomas was not the father of the said child; but that after the marriage he adopted the said child, and allowed it to take his name, then such child, under the circumstances proved in this case, would not be entitled to claim a pension under the act of Congress." (*Qu.*? March 4, 1814, [3 Stat. at Large, 103.]

But the COURT also instructed the jury, "that the facts, that the said Orral T. Thomas married the mother of the said Mary Ann after her birth, and received and maintained the child as his own, and called her his child, and suffered her to call him father, and to be called by his name, if believed by the jury, were evidence, from which, if not contradicted by other evidence, the jury may infer that she was begotten by the said Orral T. Thomas."

Mr. Key then prayed the Court to instruct the jury, "that if the prisoners" (both affiants being upon their trial,) "knew, or believed that the said Mary Ann Thomas was not begotten by the said Orral T. Thomas, then their affidavit is false; and if they made the oath knowingly, and the affidavit was correctly read over to them, then such taking such oath is perjury."

But the COURT refused to give the instruction.

Verdict, not guilty.

UNITED STATES v. RICHARD H. WHITE.

If it appears, upon the whole record upon an indictment for a misdemeanor, that the offence was committed more than two years before the indictment was found, the defendant may avail himself of that defence, by a general demurrer.

A recognizance, to appear in Court from day to day, to answer to a certain indictment, and not to depart without the leave of the Court, is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the Court to depart, and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment.

INDICTMENT for burning the treasury building of the United States.

The defendant, by his counsel, *Mr. W. L. Brent*, filed a general demurrer to the indictment, at the last term, because it appeared upon the face of the indictment, that the offence was committed more than two years before the finding of the indictment; and cited the opinion of this Court in *Walkins's case*, at May term, 1829, (3 Cranch, C. C. 441,) as reported in the pamphlet report of that case, p. 129; in which case the Court, upon demurrer, quashed one of the indictments on that ground.

In that case this Court said: "In answer to this objection, it has been said, 1st, that it does not appear upon the face of the indictment at what time it was found. 2d. That advantage of the limitation cannot be taken by demurrer; because the United States would thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years.

"The answer to the first objection is, that it will appear, from the caption of the indictment whenever the record is made up, at what time the indictment was found. And upon demurrer the judgment of the Court must be upon the whole record. And if, upon the whole record, it should appear to the Court that the offence was committed beyond the time limited, they could not give judgment against the defendant.

"To the second objection, to wit, that the defendant cannot take advantage of the limitation upon demurrer; the answer is this: that, however it may be in practice, yet in theory, and by law, if judgment upon demurrer to an indictment for a misdemeanor be given against the defendant, it is a peremptory judgment of condemnation; and although in practice the Court will often rather intimate its opinion than pronounce sentence, and permit the defendant to withdraw his demurrer and plead to issue; yet, upon the question whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the Court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the Court cannot deprive him of the benefit of it.

"We think, therefore, that the defendant has a right, upon demurrer, to avail himself of the statute of limitations.

“It has been said that the United States would thereby be precluded from replying the flight of the defendant, if such should have been the fact; but that is not the fault of the defendant. The United States have put themselves in that situation by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so; for they might have laid the day to have been within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence; or they might have stated in the indictment the true time, and any facts which existed and went to show that the defendant could not avail himself of the limitation.”

The defendant's counsel also cited the opinion of this Court in the case of the *United States v. Henry H. White*, at March term, 1837, (*ante*, p. 73,) in which the defendant's counsel moved in arrest of judgment upon the same ground. But the Court overruled the motion, and said, “There seems to be a great difference between a demurrer directly to the indictment, before any other pleadings have been had in the case, and a motion in arrest of judgment after all the pleadings have been made up, issue joined, and verdict thereupon. In the first case, the judgment of the Court must be upon the whole record as it then appears; and upon a motion in arrest of judgment, after verdict, the judgment must be upon the whole record as it then appears. There may be a *prima facie* cause of demurrer to the indictment, which may be removed by the subsequent pleadings. An indictment may, upon its face, state a fact which would be a good defence, and the defendant may, in that stage of the cause, avail himself of it by demurrer.

Mr. Key, upon considering those cases, gave up the point, and the COURT rendered judgment upon the demurrer for the defendant, and quashed the indictment.

Mr. Key then stated, that he had just sent up to the grand jury another indictment, charging his fleeing from justice, and thereby avoiding the bar of limitation, which new indictment was still under consideration of the grand jury, and therefore prayed that the defendant might be taken into custody; considering his recognizance as discharged by the quashing of the indictment.

The recognizance was in the usual form; to appear on a certain day, and from day to day, to answer to a certain indictment, and not to depart without leave of the Court.

Mr. Key cited 1 Chitty, Cr. L. 103, that upon quashing an indictment the recognizance to answer it is discharged.

Mr. R. J. Brent, for the defendant, cited the same book and

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page; that although the indictment is discharged, yet if the recognizance is to answer and not depart without leave, and the prosecutor sends up a new indictment, and the defendant departs without leave, the recognizance is forfeited. He cited also the case of *Queen v. Ridpath*, 10 Mod. 152.

The COURT (THRUSTON, J., absent,) directed the marshal to take the defendant into custody during this discussion;

But, upon consideration, were of opinion that the recognizance being to attend from day to day to answer to the charge, and not to depart without the leave of the Court, was not discharged by the quashing of the indictment; and, as he had been heretofore long in confinement upon this charge, and having had three juries sworn, without a valid verdict; and having now appeared upon his recognizance,

The COURT refused to require new bail, but permitted him to go upon the old recognizance; and upon affidavit continued the cause until the next term, the grand jury having found a new indictment.

 UNITED STATES v. NATHANIEL GREEN NOBLE.

An indictment under the 18th section of the charter of the late Bank of the United States, (April 10, 1816,) for uttering as true, a forged note of that bank, must aver that it was made "in imitation of, — or purporting to be, — a bill or note issued by order of the President, Directors, and Company of the said bank."

But without such averment, it may be a good indictment under the 11th section of the Penitentiary Act for the District of Columbia, of the 2d of March, 1831.

Notwithstanding the expiration of the term for which the corporation was created, its corporate capacity continued to exist, under the 21st section of the charter, for two years, for the final settlement and liquidation of its affairs; and during that period the bank was liable to be injured by the forgery of its notes, and such forgery committed within the two years, was properly averred in the indictment to be "to the prejudice of the right of, and with intent to defraud the President, Directors, and Company of the Bank of the United States."

An indictment, under the 11th section of the Penitentiary Act for the District of Columbia, for uttering as true a forged paper writing, must aver that the uttering was to the prejudice of the right of some person, body politic or corporate, or voluntary association, and with intent to defraud such person, body politic, &c.; but *quære*, whether it is not a good indictment at common law?

Upon an indictment for uttering forged bank notes, evidence may be given on the part of the United States, that a parcel of counterfeit checks and drafts on other banks, and others printed on bank paper, not filled up, were found in the defendant's possession.

FOUR indictments were found by the grand jury against the defendant.

1. The first, (No. 146,) contained four counts.

The 1st count charged that the defendant, on the 16th of July, 1837, "had in his possession and custody, one hundred and thirteen blank notes engraved and printed after the similitude of

notes issued by the Corporation of the President, Directors, and Company of the Bank of the United States, with intent to use said blanks, and to cause and suffer the same to be used in forging and counterfeiting notes issued by the said corporation, with intent to defraud the said corporation, against the form of the statute," &c.

The 2d count was like the first, except that it charged the intent to be "to defraud the person or persons to whom the same should be uttered and passed."

The 3d count charged that the defendant "had in his custody and possession, three forged and counterfeited engraved papers, purporting to be bank-notes of the President, Directors, and Company of the Bank of the United States, for the payment of \$10 each, after the similitude of the notes of the said corporation of the President, Directors, and Company of the Bank of the United States, with intent to utter and pass the said forged and counterfeited engraved papers, as and for the genuine notes of the said President, Directors, and Company of the Bank of the United States, with intent to defraud the said President, Directors, and Company of the Bank of the United States against the form of the statute," &c.

The 4th count was like the third, except that the notes were said to be "after the similitude of the notes of the said bank," and "with intent to defraud the person and persons to whom the same should be uttered and passed."

The other three indictments, Nos. 154, 155, and 156, were for uttering three forged notes of \$10 each, purporting to be bank-notes of the Bank of the United States. These indictments were all alike, except the description of the note in each.

Each indictment contained two counts. The 1st count charged that the defendant, on the 16th of July, 1837, passed as true, a certain false, forged, and counterfeited paper writing, purporting to be a bank-note of the Bank of the United States, which note, dated March 14, 1836, is set out *verbatim*, "to the prejudice of the right of the President, Directors, and Company of the Bank of the United States, he then knowing the same to be false," &c. "against the form of the statute."

The 2d count states that the defendant "feloniously did falsely pass as true, a certain other false" &c. "paper writing, purporting," &c. as in the first count, "with intent to defraud one Fontaine D. Merritt, knowing," &c. against the form of the statute, &c.

To all these indictments, the defendant filed a general demurrer.

By the 7th section of the charter of the bank, (10 April, 1816,) the corporation was to continue until the 3d day of March, 1836,

and by the 21st section, it is provided, that, "notwithstanding the expiration of the term for which the said corporation is created, it shall be lawful to use the corporate name, style, and capacity, for the purposes of suits, for the final settlement and liquidation of the affairs and accounts of the corporation, and for the sale and disposition of their estate, real, personal, and mixed; but not for any other purpose, or in any other manner whatsoever, nor for a period exceeding two years after the expiration of the said term of incorporation."

By the 18th section of the charter, "if any person shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any false, forged, or counterfeited bill or note, purporting to be a bill or note issued by order of the President, Directors, and Company of the said bank," "every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for not less than three years, nor more than ten years; or shall be imprisoned not exceeding ten years, and fined not exceeding five thousand dollars."

By the 19th section, "If any person" "shall have in his custody or possession, any blank note or notes, bill or bills, engraved and printed after the similitude of any notes or bills issued by said corporation, with intent to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation," "every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a term not exceeding five years; or shall be imprisoned for a term not exceeding five years, and fined in a sum not exceeding five thousand dollars."

Mr. R. J. Brent, for the defendant, contended that the first count of these three indictments, was defective as a count upon the 18th section of the charter, because it did not aver that the forged note purported to be a bill or note issued by order of the President, Directors, and Company of the Bank of the United States. That the bank charter expired on the 3d of March, 1836, and therefore the corporation, on the 14th of March, 1836, the date of the forged note, had no power to make such a note.

That it was not a good count under the 11th section of the Penitentiary Act, because the bank, not being in existence on the 16th of July, 1837, when the offence is charged to have been committed, could not be prejudiced; it had no right that could be prejudiced.

That the 2d count was bad under the 18th section of the charter, for the same reasons; and was also bad under the Penitentiary

Act, because it is not averred to be to the prejudice of any person or body politic, &c.

Mr. Key, contra, contended that both the counts were good under the Penitentiary Act, and at common law.

By the 11th section of the Penitentiary Act for the District of Columbia; "Every person duly convicted of having passed, uttered, or published, or attempted to pass, utter, or publish as true, any such falsely made, uttered, forged, or counterfeited paper writing, or printed paper, to the prejudice of the right of any other person, body politic or corporate, or voluntary association, knowing the same to be falsely made," &c. "with intent to defraud such person, body politic," &c. "shall be sentenced," &c.

CRANCH, C. J. It is contended that the first count of the indictments for uttering the forged notes, is not good under the eighteenth section of the charter of the bank, of the 10th of April, 1816, because it does not aver that the note purported to be a bill or note issued by order of the President, Directors, and Company of the Bank of the United States; and because, neither on the 14th of March, 1836, the date of the note, nor on the 16th of July, 1837, when the offence was committed, had the Bank of the United States any legal existence; its charter having been limited to the 3d of March, 1836; nor had the bank, then, any right or authority to issue any such note. And that it is not a good count under the Penitentiary Act for the District of Columbia, because the bank, having no legal existence, could neither be prejudiced nor injured.

I am of opinion that the first count is bad under the eighteenth section of the charter, because it does not aver that the forged note purported to be a bill or note issued by order of the President, Directors, and Company of the said bank.

But I think it a good count under the Penitentiary Act; because I consider the bank as still in existence for this purpose; that is, to protect itself during the period of two years from the 3d of March, 1836, given by the twenty-first section of the charter, which declares, that "notwithstanding the expiration of the term for which the said corporation is created, it shall be lawful to use the corporate name, style, and capacity, for the purpose of suits; for the final settlement and liquidation of the affairs and accounts of the corporation; and for the sale and disposition of their estate, real, personal, and mixed."

It is not said by whom the corporate capacity may be used for those purposes. The use is not confined to the corporation. Their capacity to sue, and to be sued, continues. The United States may use it for the purpose of vindicating the laws of the United States, and for the punishment of offenders. The corpo-

ration may use it for all purposes necessary to the final settlement and liquidation of their affairs. In order that such settlement should be justly made, it is necessary that they should be protected from forgeries, by which they may unquestionably be injured. They have still the capacity to be injured; and, therefore, it was right and correct in this court, to aver that the passing of the forged note was to the prejudice of the right of, and with intent to defraud the President, Directors, and Company of the Bank of the United States.

2. The second count is not good under the eighteenth section of the bank charter, and, I presume, was not framed in reference to that section. Nor is it good under the Penitentiary Act, because it does not aver that the act was done to the prejudice of the right of any person or body politic. I am inclined, however, to think that it may be supported as a count at common law; but I shall be willing to hear a motion in arrest of judgment if the verdict should be against the defendant upon that count only.

There is another indictment, (No. 146,) against this defendant, the two first counts of which are framed upon the nineteenth section of the bank charter, for having in his possession blank notes engraved and printed after the similitude of notes issued by the corporation of the Bank of the United States with intent to use them in forging and counterfeiting notes issued by that corporation; the first count says with intent to defraud the said corporation; the second count says, with intent to defraud the person or persons to whom the same should be uttered and passed.

I do not see any valid objection to these two counts.

The third and fourth are for having in his possession three forged and counterfeited engraved papers purporting to be bank notes of the President, Directors, and Company of the Bank of the United States for the payment of ten dollars each, after the similitude of the notes of the said corporation, with intent to utter and pass them as true with intent (in the third count) to defraud the Bank of the United States; and (in the fourth count) with intent to defraud the person or persons to whom the same should be passed, contrary to the form of the statute, &c.

I do not know under what statute these third and fourth counts have been framed. They are not good at common law.

MORSELL, J., concurred as to the indictment No. 146, and as to the second count of the other indictment; but not as to the first count; because he thought the Bank of the United States was not in existence for this purpose, and therefore could not be prejudiced or injured. (THRUSTON, J., absent.)

Demurrer overruled as to the two first counts in the indictment No. 146; and sustained as to the third and fourth counts. Sen-

tence, one week's imprisonment and one dollar fine only; MORSELL, J., being very doubtful as to the first count, which charged the intent to be to defraud the Bank of the United States. As to the other indictments, the demurrer was overruled, and the defendant was permitted to plead the general issue.

Upon the trial, the COURT (*nem. con.*) permitted evidence to be given by the United States, that a parcel of counterfeit checks and drafts on other banks; and others printed on bank-paper, not filled up, were found in the defendant's possession. (See *United States v. Shuster*, at March term, 1835, in this Court, where the Court permitted the United States to give evidence that certain instruments for picking locks, &c., were found upon the prisoner.)

Verdict, guilty upon the four indictments; and the prisoner was sentenced, in full Court, as follows: Upon the two first counts in the indictment No. 146, fine and imprisonment, as mentioned above.

Upon the indictment No. 154, to the penitentiary for two years next after the expiration or other termination of his term of imprisonment in No. 146.

Upon the indictment No. 155, for two years next after the expiration, or other termination of his term of imprisonment in No. 154; and upon the indictment No. 156, for three years next after the expiration or other termination of his term of imprisonment in No. 155; making seven years in all.

PRATHER, Administrator of Burgess, v. DEBORAH BURGESS.

A deed of personal property, not acknowledged and recorded according to the Maryland Act of 1729, c. 8, is valid between the parties, and those claiming under them, although possession should not accompany and follow the deed.

A deed of bargain and sale of her slaves, by a *feme sole*, to a trustee for her separate use, (notwithstanding her future coverture,) and without any control of her husband (one slave being delivered to the trustee in the name of all,) is a bar to the marital rights of the future husband, unless made without his privity or assent. But if made pending the treaty of marriage, without valuable consideration, and without the privity or knowledge of the husband, it is void as to him. The frequent declarations, however, of the husband, after the marriage, that the slaves were not his, but belonged exclusively to his wife, were evidence from which the jury might infer that the deed was made with his knowledge and assent.

TROVER for slaves valued at eight thousand dollars.

The defendant offered evidence that she owned the slaves before her marriage with the plaintiff's intestate; and while sole, conveyed them by a deed of bargain and sale to one Thomas

Gassaway, in trust for her separate use without the control of her future husband, notwithstanding the coverture. That the deed was delivered to Gassaway, but was not acknowledged or recorded according to the Maryland Act of 1729, c. 8, but that one of the slaves was delivered, in the name of all, to the trustee. That at the time of executing the deed she resided in Washington, D. C., but the slaves were principally in Montgomery county, in Maryland. That the deed was made a few months prior to the marriage, but pending the treaty; that Burgess lived in Ann Arundel county in Maryland, and was not present at the execution of the deed; that the witnesses never heard from him that he knew of the deed; but that after the marriage he was frequently heard to say that the slaves were the property of his wife, and he wished her to sell them, and sometimes drove them away from his plantation. That the deed was destroyed by fire together with the dwelling-house of the trustee, who had become, and still remained insane.

Upon this evidence the COURT (THRUSTON, J., absent,) at the motion of *Mr. R. S. Coxe*, for the plaintiff, instructed the jury, that if they should believe from the evidence that the deed was made without any valuable consideration passing from the grantee to the grantor, and before her marriage, without the privity or knowledge of her intended husband, then the said deed is void as to him and his administrator, the plaintiff, and does not constitute any bar to this action. To which instruction the defendant excepted. And at the prayer of *Messrs. Brent & Brent*, the defendant's counsel, the COURT instructed the jury, that if they should find from the evidence that the deed of trust was made, by the defendant, several months before her marriage, and that after her marriage her husband, the said Basil Burgess, frequently declared that the slaves named in the deed of trust were not his, and that he had no control over, or right to them, but that they belonged exclusively to his wife, it is competent for the jury to infer, that such declarations were made in reference to the said deed of trust, and that it was made with his knowledge and assent. To which instruction the plaintiff excepted.

The COURT, also, at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence that the defendant, before her intermarriage with the said Basil Burgess, and during the treaty for the marriage, executed and delivered a deed of bargain and sale to Hanson Gassaway, in the usual form, acknowledging the payment of a sum of money, and acknowledging that the defendant had, for such consideration, bargained and sold the said slaves to the said Hanson Gassaway,

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to have and to hold the same in trust for the separate use of the defendant, notwithstanding her coverture, and without any control of her husband, and that one of the said slaves was, at the time of executing and delivering the said deed, delivered to the said Hanson Gassaway, in the name of the whole; then the said deed is a bar to the marital rights of the said Basil Burgess, and the plaintiff cannot recover in this action unless the said deed was made without the privity or assent of the said Basil Burgess. To which instruction the plaintiff also excepted.

Mr. Coxe, cited *Clancy on Marital Rights*, 62, 614; *Carlton v. Dorset*, 2 Verm. 17.

Mr. Brent cited *Orr v. Picket*, 3 Marsh. 279; *Jenkins v. Morton*, 3 Monroe, 30; 1 Tuck. Com. 110; *Strathmore v. Bowes*, 1 Ves. Jr. 28.

Verdict for defendant.



UNITED STATES v. ISAAC BEDDO, Colored Witnesses.

INDICTMENT for larceny. The defendant was a colored man, born of a white woman.

The Court rejected, as witnesses, free colored persons, not born of white mothers.

Verdict, not guilty.



UNITED STATES v. BENJAMIN RINGGOLD.

An indictment for keeping "a faro-bank" is bad, unless it aver the faro-bank to be a common gaming-table.

An indictment for keeping "a certain public gaming-table called faro-bank," is bad.

An indictment for keeping "a gaming-table," is bad.

THERE were three indictments against the defendant.

The first (No. 140) had only one count, which charged that the defendant "did keep a faro-bank," against the form of the statute, &c.

The second (No. 141) had two counts. The first charged that the defendant "did keep a certain public gaming-table called faro-bank." The second count charged that the defendant "did keep a faro-bank."

The third indictment (No. 142) also had two counts. The first

charged that the defendant "did keep a gaming-table." The second charged that the defendant "did keep a faro-bank."

All these counts concluded, against the form of the statute.

By the first section of the Penitentiary Act for the District of Columbia, (2d March, 1831,) it is enacted, among other things, "that every person who shall be convicted" "of keeping a faro-bank, or other common gaming table," "shall be sentenced to suffer punishment, by imprisonment and labor, for the time and times hereinafter prescribed, in the Penitentiary Act for the District of Columbia." And by the twelfth section, it is, among other things, enacted, "that every person duly convicted" "of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years."

Mr. Dandridge, for the defendant, moved to quash these indictments, because neither of them averred that the defendant kept a common gaming-table; and he contended that it was not sufficient to charge the defendant with keeping a faro-bank, without averring that a faro-bank was a common gaming-table. Every faro-bank is not a common gaming-table; and, unless it be, it is not indictable.

The COURT (THRUSTON, J., absent,) took time to consider.

See the following cases, in this Court, namely: *The United States v. Negro Henry Smith*, at November term, 1835, (4 Cranch, C. C. 629); *The United States v. Azariah Cooly*, at March term, 1836, (4 Cranch, C. C. 707,) for keeping "a certain gaming-table called a faro-bank;" *The United States v. McCormick*, at the same term, for keeping "a certain public gaming-table called a faro-bank;" and *The United States v. Fleet Smith*, at the same term, who was indicted for taking insufficient bail on an indictment against one Miller, for keeping "a certain gaming-table called a faro-bank;" and *Craven's case*, in Russell & Ryan's Crown Cases, 14.

In *Cooly's case*, the Court, (*nem. con.*) upon the authority of *Craven's case*, quashed the indictment, "being of opinion that the indictment must charge the offence to be the keeping either of a common gaming-table, or the keeping of a faro-bank; not merely a gaming-table called a faro-bank." In that case THRUSTON, J., suggested that the best way of charging the offence would be to charge it as the keeping of a faro-bank, the same being a common gaming-table. In *McCormick's case*, the Court (MORSELL, J., absent,) on the authority of *Cooly's case*, quashed the indictment. In *Fleet Smith's case*, the Court (MORSELL, J., absent,) held, that the indictment against Miller, which was for keeping "a certain gaming-table called a faro-bank," did not describe an indictable offence. On the last day of the term, the Court being full, but

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Mr. Key, the District Attorney, absent on account of the illness of one of his family, and after the Court had given notice that it was about to close the session, *Mr. Dandridge* and *Mr. Bradley* argued the case again. They said that *Mr. Key* admitted that a faro-bank might be innocently kept, and that it is not punishable unless it be a common gaming-table; and, upon that admission, *THRUSTON*, J., argued that the term "faro-bank," was too uncertain in itself to support an indictment.

CRANCH, C. J., said, I think the first count of the indictment No. 141, which charges that the defendant kept "a certain public gaming-table called faro-bank," is bad, upon the authority of *Cooly's* and *McCormick's* cases. And that the first count of the indictment No. 142, which charges that he kept "a gaming-table," is also bad, because it is not charged to be a common gaming-table.

I think the counts, charging that he kept a faro-bank, are good, because the words "a faro-bank or other common gaming-table," necessarily imply that a faro-bank is a common gaming-table; so that it would be tautology to say a common faro-bank.

Nor do I think it necessary to aver that a faro-bank is a common gaming-table, because the keeping of a faro-bank is, *per se*, made an offence. If it should be averred to be a common faro-bank, the defendant might, perhaps, deny that it was common; and prove that guards were placed at the door to prevent the approach of the officers of justice, and all others who might inform against them; which class might include a large proportion of the community. To prevent such cavilling, the word "common" might have been, by the legislature, designedly omitted before the term "faro-bank," from abundant caution.

I am of opinion that the counts which charge the keeping of a faro-bank, are good under the statute; and that the other counts are bad, and should be quashed.

MORSELL, J., not being prepared to give an opinion, the Court took time to advise until the next term.

At March term, 1838, the COURT (*CRANCH*, C. J., absent,) quashed these indictments, because, as it is understood, neither count charged the defendant with keeping a common faro-bank, nor a common gaming-table.

NOTE. *THRUSTON*, J., was prevented by severe indisposition from attending at this term, except a few days.

Corporation of Washington v. Lasky.

JAMES OWNER v. THE CORPORATION OF WASHINGTON.

Appeal does not lie from a justice of the peace, who has rendered judgment for \$5 only.

The COURT (THRUSTON, J., absent,) dismissed the appeal, because this Court has no original or appellate jurisdiction where the debt or demand does not exceed five dollars.

Mr. Hoban, for the defendant, contended that, as the warrant did not specify the sum demanded, it did not appear that it was not for more than five dollars; and if it was, the defendant has a right to appeal, although the judgment is for five dollars only.

But the COURT dismissed the appeal.

THE CORPORATION OF WASHINGTON v. LUCY LASKY.

The Corporation of Washington, under its charter, has power to prohibit ordinary keepers to sell spirituous liquors to free colored persons.

APPEAL from the judgment of Mr. Coote, a justice of the peace, who nonsuited the corporation in an action of debt for a penalty of twenty dollars; "for that the said Lucy Lasky, the keeper of a tavern or ordinary, in the third ward, at the city of Washington, did sell, or permit to be sold, spirituous liquors to slaves or other persons of color, on Sundays, and other days, between sunset and sunrise on the 4th instant, and at divers other times, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

By the by-law of November 5, 1832, § 8, (Rothwell, 263,) it is enacted, "That all keepers of ordinaries or taverns, shall be, and they are hereby prohibited from selling spirituous liquors to slaves, or other persons of color, on Sundays, and other days between sunset and sunrise; and any keeper of a tavern or ordinary, who shall sell, or permit to be sold, any spirituous liquors, in violation of this prohibition, shall, on conviction for the first offence, be fined twenty dollars; and for the second offence, forfeit his license, which shall be annulled by the mayor."

CRANCH, C. J. The question submitted, as I understand it, is, whether under the power given by the 7th section of the charter of 1820, "to provide for licensing, taxing, and regulating ordinaries and taverns, the corporation can prohibit licensed tavern-keepers to sell spirituous liquors to free colored persons, there being no like prohibition to sell to white persons, to wit: Can the

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corporation, in this respect, lawfully discriminate between white and colored persons?

I am of opinion that, under the power to provide for licensing, taxing, and regulating ordinaries and taverns, the corporation has power to prohibit the sale of spirituous liquors to colored persons of all descriptions, free or bond, young or old, or to minors, apprentices, servants, hack-drivers, porters, &c., whether white or colored.

MORSELL, J., concurred; but for the informality and uncertainty of the charge in the warrant,

The COURT (THRUSTON, J., absent,) affirmed the judgment.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1838, AT WASHINGTON.

GEORGE W. PETER *et al.* v. RICHARD SMITH *et al.*

If a second incumbrancer takes up a prior incumbrance, which was also a lien upon other property than that bound by the second incumbrance, the second incumbrancer may resort to the property bound by the first incumbrance, and enforce the lien upon it.

BILL in equity to enable second incumbrancers who had taken up the first incumbrance, to indemnify themselves by enforcing the lien of the first incumbrance upon property not covered by the second.

Certain judgments, obtained by the Union Bank of Georgetown, in 1822, against George W. Peter, bound all his real estate.

On the 9th of April, 1824, George W. Peter conveyed all his real estate, except eleven lots in Washington, to Thomas Peter, in trust to pay certain debts due by George W. Peter to the Bank of the United States and others, for which Thomas Peter was liable as indorser. These creditors, seeing that those judgments were an incumbrance upon the property conveyed for their security to Thomas Peter, and not knowing that George W. Peter had any other real estate bound by those judgments, with a view to clear the title, so that the trustee might sell the property to the best advantage, and to save the costs of a marshal's sale under execution, agreed that the trustee should pay the debt due upon those judgments to the Union Bank, out of the proceeds of the sales of the trust fund.

With this understanding the property was sold on the 17th and 18th of September, 1829. Between that time and the 1st of October next following, it was discovered that there were eleven lots in Washington belonging to George W. Peter, not included in the deed of trust of the 9th of April, 1824, and which were

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also bound by the judgments in favor of the Union Bank ; and it was agreed by the creditors secured by that deed of trust, among whom was the Bank of the United States, that those eleven lots should be conveyed by George W. Peter to Thomas Peter, in trust to discharge the several judgments against George W. Peter, according to their legal priorities ; and they were so conveyed on the 1st of October, 1829.

Mr. Thomas Peter, the trustee under the deed of the 9th of April, 1824, appointed the defendant, Mr. Richard Smith, his agent to execute that trust. Mr. Smith, who was also the cashier of the Branch Bank of the United States at Washington, sold the property, and on the 6th of January, 1830, paid the debt due to the Union Bank on those judgments of 1822, and took an assignment of them to the Bank of the United States, who have brought writs of *scire facias* to revive them ; which writs are still pending in this Court.

The Bank of the United States obtained a judgment against Mr. George W. Peter, for \$5,000, on the 17th of May, 1824, and now contends that the eleven lots were relieved from the lien of the judgments in favor of the Union Bank, by the agreement to discharge and satisfy those judgments out of the proceeds of the sales of the property conveyed to Thomas Peter, in trust, on the 9th of April, 1824 ; and that their judgment of the 17th of May, 1824, bound those eleven lots long before they were conveyed to Thomas Peter by George W. Peter, by the deeds of October, 1829, and May, 1830.

On the contrary, the complainants contend, that as a court of equity would have compelled the Union Bank, who had a lien upon the whole, to resort in the first place to the eleven lots which were not covered by the deed of trust, the trustee in that deed, who was the second incumbrancer, and who has paid off the first incumbrance to the Union Bank, has a right to stand in its place, and use its judgments to indemnify him for the amount thus paid ; and that, as the whole of the property has been sold, and the proceeds are within the control of this Court, it ought to marshal the assets accordingly ; and that the proceeds of the sales of the eleven lots should be applied to reimburse the money taken out of the trust fund, to discharge the debt due to the Union Bank upon the judgments of 1822.

And of that opinion was the Court, *nem. con.* Decree accordingly.

UNITED STATES, at the relation of STOCKTON *et al. v.* AMOS
KENDALL, Postmaster-General.

Upon the affirmance, by the Supreme Court of the United States, of the judgment of the Circuit Court awarding a peremptory mandamus, and upon receipt of the mandate of the Supreme Court, commanding "that such further proceedings be had in the Court below, as, according to right and justice, and the laws of the United States, ought to be had," the Court will not issue an attachment against the defendant for contempt in not obeying the former peremptory writ of mandamus, which was superseded by the writ of error, but will issue an alias writ of peremptory mandamus.

It is a sufficient return of a writ of mandamus to certify that the thing commanded has been done, although not by the defendant personally.

When the mandamus is to credit a certain sum of money, it is a sufficient obedience to the writ to credit that sum without interest.

A WRIT OF ERROR having been issued to the judgment of this Court in March term, 1837, awarding a peremptory mandamus in this case, (*ante* 163,) and the judgment having been affirmed, the following mandate was received from the Supreme Court.

"United States of America, ss. The President of the United States of America: To the Honorable the judges of the Circuit Court of the United States, for the District of Columbia, holden in and for the County of Washington; Greeting.

"Whereas lately, in the Circuit Court of the United States for the District of Columbia, before you, or some of you, in a cause between The United States, at the relation of William B. Stokes, Richard C. Stockton, and Daniel Moore, plaintiffs, and Amos Kendall, Postmaster-General of the United States, defendant, on petition for a writ of mandamus, wherein the said Circuit Court, on the 13th day of July, in the year 1837, made the following order for a peremptory mandamus, viz. 'Whereas' &c. (reciting the order at full length,) 'as by the inspection of the transcript of the record of the said Circuit Court, &c. fully and at large appears. And whereas at the present term of January, in the year of our Lord, one thousand eight hundred and thirty-eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is adjudged and ordered by this Court, that the judgment of the said Circuit Court be, and the same is hereby affirmed with costs. March 12th.

"You therefore are hereby commanded, that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said writ of error notwithstanding.' Witness, &c."

Whereupon, *Mr. Coxe* for the relators, moved the Court for an attachment against *Mr. Kendall*, for not having obeyed the per-

emptory writ of *mandamus* issued by this Court on the 13th of July, 1837, which writ this Court had adjudged to be superseded by the writ of error.

The Court, however, refused now to issue an attachment for that cause, but on the 30th of March, 1838, directed an alias peremptory writ of *mandamus* to be issued, returnable on the 3d of April.

CRANCH, C. J., thought that eight days should have been allowed for the return.

On the 3d of April, the peremptory writ of *mandamus* was returned with the following indorsement in the handwriting of the Postmaster-General.

“*Post-Office Department*, April 3d, 1838.

“Having communicated the awards of the Solicitor of the Treasury, referred to in the within writ, to the Auditor of the Treasury for the Post-Office Department, who has the legal custody of the books on which the accounts of this department are kept, I have received from him official information, that the balance of said awards, viz. thirty-nine thousand four hundred and seventy-two dollars, and forty-seven cents, (\$39,472.47) has been entered to the credit of the claimants in said books.

“AMOS KENDALL, *PostMaster-General*.”

On the 4th of April, *Mr. Coxe* moved the Court to quash this return of the peremptory *mandamus*, and to issue an attachment of contempt against the Postmaster-General ;

1. Because the return does not certify perfect obedience to the writ in this, that the Postmaster-General has not certified that he has credited the relators, or caused them to be credited with the balance of the awards.

2. Because he has not certified that he has credited the relators with the interest upon that balance from the time it ought to have been paid until the time of giving the credit for the balance. *Osborn v. United States Bank*, 9 Wheat. 337 ; *Thorndike v. United States*, 2 Mason, 18.

BUT the COURT, (*nem. con.*) overruled the motion.

1. Because the return substantially certifies that the credit has been given according to the command of the writ ; and,

2. Because the Postmaster-General has not been commanded to credit the interest ; and this Court cannot, in this cause, compel him to credit it, so as to charge the United States with it, or to make him personally liable for it ; or to bring him into contempt for not crediting interest upon the award, or any part of it.

CRANCH, C. J. The question is, whether the Postmaster-General has substantially done what he was commanded to do.

The petition for the *mandamus* complains that the Postmaster-

General refused to pay or credit the petitioners the residue of the sum awarded by the Solicitor of the Treasury, being \$39,472.47, or to pay or credit the interest upon such balance so withheld; wherefore they pray that a writ of *mandamus* may issue to the Postmaster-General commanding him,

1. "That he fully comply with, obey, and execute, the aforesaid Act of Congress of July 2, 1836, by crediting your petitioners with the full and entire sum so awarded as aforesaid in their favor by the Solicitor of the Treasury as aforesaid, in conformity with said award and decision.

2. "That he shall pay to your petitioners the full amount so awarded, with interest thereon, deducting only the amount which shall be justly charged or chargeable to your memorialists against the same."

The Act of Congress of the 2d of July, 1836, enacts, that the Postmaster-General "be, and is hereby directed, to credit such mail contractors with whatever sum or sums of money, if any, the said Solicitor shall so decide to be due to them for or on account of any such service or contract."

The rule to show cause was in conformity with the prayer of the petition for the *mandamus*, namely, to show cause why the Postmaster-General should not be commanded, first, to comply with the act by crediting the petitioners with the full and entire sum so awarded, in conformity with the said award and decision; and, secondly, that he should pay the full amount so awarded, with interest thereon, deducting only the amount which shall be justly charged or chargeable to the said memorialists against the same.

The Court, however, awarded the *mandamus* only upon the first branch of the prayer; because the Act of Congress did not require the Postmaster-General to pay, but only to credit the contractors with the amount of the award; and because the Court doubted its authority, in this form of proceeding, and upon the facts stated in the petition, to go into an investigation of the general account between the contractors and the department, which they must have done before they could say what amount should be justly charged or chargeable to the memorialists against the amount of the solicitor's award.

The order of the Court for the *mandamus nisi* recites the substance of the Act of July 2, 1836, and of the award of the Solicitor of the Treasury; the payment of \$122,101.46, and the refusal of the Postmaster-General to pay or credit the residue, being \$39,472.47; the petition for the *mandamus*; the rule to show cause, and the Postmaster-General's failure to show cause, &c.; and then directs the *mandamus nisi* to be issued, commanding the

Postmaster-General to "credit such mail contractors with the full amount of money so awarded and decided by the said Solicitor of the Treasury to be due to said mail contractors, according to the true intent and meaning of the said award and decision, or that he show cause to the contrary," &c.

The *mandamus nisi* has the same recitals, and commands the Postmaster-General fully to comply with, obey, and execute, on his part, the aforesaid act of Congress of July 2, 1836, "by crediting the said mail contractors with the full and entire sum so awarded and decided as aforesaid to be due to them, by the said Solicitor of the Treasury, according to the true intent and meaning of said award and decision, so that complaint be not again made to the said Circuit Court, and that you certify perfect obedience to, and due execution of, this writ, to the said Circuit Court, on Saturday the 10th of June, instant; or that you do, on that day," show cause to the contrary.

The peremptory *mandamus* contains similar recitals; and that the *mandamus nisi* had been issued and served, and that no good cause had been shown, &c., and commands the Postmaster-General "that he do forthwith and without delay, immediately upon the receipt of the writ, credit said mail contractors, as he was before commanded; and that he certify perfect obedience to, and full execution of said writ to this Court, on the second Monday of August next," &c.

On the 12th of November, 1836, the Solicitor of the Treasury notified the Postmaster-General that he awarded, in part, the sum of \$110,140, and on the 23d of November, 1836, that he awarded the further sum of \$52,597.09, from which he afterwards deducted \$1,163.16 for an error, leaving the sum of \$51,433.93 to be added to the amount awarded on the 12th of November; making an aggregate sum of \$161,573.93. Of this sum the Postmaster-General credited the contractors with the sum of \$122,101.46, and refused to credit them with the residue of the award, being the sum of \$39,472.47, which sum was withheld by him from the 23d of November, 1836, until the same was passed to their credit by the Auditor of the Treasury for the Post-Office Department on or about the 3d of April, 1838.

Of the sum thus last awarded by the Solicitor of the Treasury, the sum of \$6,893.93 was for interest upon certain items of current pay due to the contractors quarterly, according to their contracts, and withheld by the Postmaster-General, in order to reimburse the department for moneys supposed to have been improperly credited by the preceding Postmaster-General for extra services, but which the Solicitor of the Treasury decided to have been correctly credited.

The aggregate of the sums upon which the Solicitor thus allowed interest is \$133,569.56. Of this sum the Postmaster-General credited the contractors with \$122,101.46 immediately after the award, leaving unpaid only \$11,468.10 of the amount which the solicitor decided should bear interest; and this is the only part of the detained balance of \$39,472.47; which, according to the principles of the award, should (if any should) bear interest from the 23d of November, 1836, till the 3d of April, 1838.

Of the residue of that balance, a part, namely, \$6,893.93, consists of interest, and the residue of allowances for extra services, upon which the solicitor did not allow interest.

If, therefore, the terms of the *mandamus*, which commands the Postmaster-General fully to comply with, obey, and execute, on his part, the Act of Congress of July 2, 1836, "by crediting the said mail contractors with the full and entire sum so awarded and decided, as aforesaid, to be due to them, by the said Solicitor of the Treasury, according to the true intent and meaning of the said award and decision," can be construed to mean that he should credit the contractors with the entire sum so awarded, and interest thereon, according to the true intent and meaning of the award, the sum of \$11,468.10 would be the only sum which, according to that intent and meaning, would carry interest. But I think the *mandamus* cannot be so construed. It contains no command to credit interest; and it gives no notice to the Postmaster-General that interest would be required to be credited. The Act of Congress only requires him to credit "whatever sum or sums of money, if any, the said solicitor shall decide to be due." It says nothing of interest. The *mandamus* commands him to do only what the statute requires him to do. We cannot consider him in contempt for not doing more. We have now no means of knowing the state of the general account of the contractors with the department. The solicitor had no authority to settle that account; he was only to decide what allowances should be made upon certain items claimed by the contractors.

We do not know that advances may not have been made by the department to the contractors which would render it improper to allow them interest upon any of the allowances made by the solicitor, other than those upon which he has allowed interest; and that interest is stopped upon the sum of \$122,101.46, paid shortly after notice of the award, leaving, as before observed, the sum of \$11,468.10 only to carry interest, if the state of the general account of the contractors with the department will justify it; of which, as before said, we have not the means of judging, even if we had authority so to do, in this form of proceeding, and in this stage of it.

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Upon the whole, I am clearly of opinion, that the Postmaster-General has substantially complied with the command of the peremptory *mandamus*, and that he cannot be considered in contempt for not crediting interest upon the balance of the award, or upon any part of it. And of that opinion was the whole Court.

UNITED STATES v. GEORGE MILBURN.

An indictment for keeping a "gaming-table," is insufficient; it should charge the keeping of a common gaming-table. An indictment for keeping a faro-bank is also bad; it should be a common faro-bank; or "a faro-bank, the same being a common gaming-table."

INDICTMENT containing two counts; 1st, That the defendant kept "a gaming-table, against the form of the statute," &c.

2d. That he kept "a faro-bank against the form of the statute," &c.

Mr. W. L. Brent, for the defendant, demurred to the whole indictment, because neither count charges the keeping of a common gaming-table, or a common faro-bank, or a faro-bank, the same being a common gaming-table, and cited *Cooly's case* (4 Cranch, C. C. 707,) and *Ringgold's case*, (*ante*, 378.)

Mr. Key, contra, contended that it was sufficient to charge the offence in the words of the statute, and cited 1 Chitty, 281. The words of the twelfth section of the Penitentiary Act are, "That every person duly convicted of keeping a faro-bank or gaming-table shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years."

But the COURT (CRANCH, C. J., *contra*, as to the second count,) stopped *Mr. Brent* in reply, and quashed the indictment. See Arch. Crim. Pleading, 24.

UNITED STATES v. WILLIAM THARP.

Upon an indictment, under the Penitentiary Act for the District of Columbia, for assault and battery with intent to kill, it is not necessary to show that the crime would have been murder, if death had ensued.

INDICTMENT for assault and battery. The first count charged it to be with intent to kill one William Walker, against the form of the statute. The second count charged a common assault and battery at common law.

Mr. Coxe, for the defendant, prayed the Court to instruct the

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jury, upon the first count, that if the offence would not have been murder, in case Walker had been killed, it is not a case within the Penitentiary Act for the District of Columbia.

But the COURT refused; MORSELL, J., saying that the point had been decided by this Court in Alexandria, (alluding to *R. B. Lloyd's case*, at October term, 1834, 4 Cranch, C. C. 468.)

UNITED STATES v. HENRY McDUELL.

Quære, whether, in an indictment for keeping a large dog of a fierce and furious nature, and suffering him to go at large in and about the public streets, &c., to the terror of the people and common nuisance, it is necessary to allege a *scienter*? It is an indictable offence at common law, to incite, provoke, and encourage a fierce and dangerous dog to bite and tear a cow.

INDICTMENT containing two counts. First, for keeping a "certain large dog of a very fierce and furious nature," and suffering the same "to go unmuzzled and at large in and about the public streets and highways in the county," "by reason whereof the good citizens of the United States," "were in great danger and hazard of being bit, maimed, and torn by the said dog, and of losing their lives, to the great damage, terror, and common nuisance of the good people of the United States, at the county aforesaid, passing and repassing; to the evil example of all others, and against the peace and government of the United States."

The second count charged that the defendant, "at the county aforesaid, in the public streets of the said county, did unlawfully incite, provoke, and encourage a certain fierce and dangerous dog to bite a certain cow belonging to one Thomas Stanley, and the said cow seriously and severely to maim and tear, whereby the said cow was much injured, to the great damage of the said cow, and to the great damage of the said Thomas Stanley, and against the peace and government of the United States."

Mr. Hoban, for the defendant, moved to quash this indictment for want of a *scienter*; and cited *Starkie* on Cr. Pleading, and *Mason v. Keeling*, 12 Mod. 332, and 3 Bl. Com. 154, in notes, Amer. Ed.

Mr. Key, *contrà*, cited 3 Chitty, 643.

The COURT (*nem. con.*) refused to quash the indictment, but told *Mr. Hoban* they would hear the question again, upon a motion in arrest of judgment, if the defendant should be convicted.

Verdict, not guilty on the first count; but guilty on the second count.

Motion in arrest of judgment, overruled. Fined \$20 and cost.

UNITED STATES v. NEGRO FRANK PEARL.

If the owner of goods, by mistake or accident, leaves them in a hackney coach, and the driver finds them there, and, knowing to whom they belong, takes and converts them to his own use with intent to steal them, he is guilty of larceny.

In an indictment under the Penitentiary Act, for stealing bank-notes, *quære* whether, it is not necessary to state the name of the bank and the date of the notes?

INDICTMENT, under the Penitentiary Act, § 9, for stealing "one silk reticule of the value of twenty cents, one silver pencil of the value of one dollar, one bank-note to the amount of fifty dollars, of the value of fifty dollars, for the payment of fifty dollars; three bank-notes, of the value of ten dollars each, to the amount of ten dollars each, for the payment of ten dollars each; of the bank-notes, goods, and chattels of one Elizabeth Lee," "against the form of the statute," &c.

Mr. W. L. Brent, and *Mr. Dandridge*, for the defendant, objected to evidence being given upon the charge of stealing the bank-notes, because they were not sufficiently described in the indictment. The name of the bank should have been stated, and the date of the notes, that it may appear that there was any such bank in existence at the date of the notes.

They cited *Starkie's Crim. Pleading*, 216, 217, upon the statute of 2 Geo. 2, c. 25, § 3, which provides for the punishment of persons for stealing "any bank-notes." An indictment under that statute describes the bank-note as being "a bank-note of the Governor and Company of the Bank of England."

If it is sufficient to describe the thing in the words of the statute, this would have been a sufficient indictment if it had merely stated that the defendant had feloniously taken and carried away "the property of Mr. Lee, of the value of five dollars."

Mr. Key, *contra*, contended that it was sufficient to charge the offence in the words of the statute. The English precedents, under the statute of 2 Geo. 2, c. 25, § 3, are so. They merely describe the note as "one bank-note." 3 Chitty, 917, 973, n. a., 974; Arch. Crim. Law, 130; 2 Leach, 1103; 2 East, Cr. Law, 602; *The King v. Johnson*, Maule & S. 547; 2 Russell on Cr. 170.

The COURT (THRUSTON, J., absent,) said the question had better be reserved for a motion in arrest of judgment; and thereupon evidence was given as to the bank-notes.

Mr. Brent contended before the jury, that if a man finds goods and converts them to his own use with intent to steal them, it is not felony; and cited to the jury several authorities, of which the Court did not take a note.

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Whereupon *Mr. Key* prayed the Court to instruct the jury, that if they believe, from the evidence, that *Mrs. Lee* left her reticule, pencil, and bank-notes in the prisoner's hackney-coach by mistake or accident, and that the prisoner found them there and knew them to belong to her, and took and converted them to his own use with intent to steal them, then he is guilty of larceny.

Mr. Key cited *Wynn's case*, Leach, 460; 2 East, Cr. L. 664; 2 Russell, 101.

The COURT (THRUSTON, J., absent,) gave the instruction as prayed.

Mr. Brent then prayed the Court, in substance, to instruct the jury, that if *Mrs. Lee* lost the property, and the defendant found it and converted it to his own use, with intent to steal it, it is not felony.

But the COURT refused.

Verdict, guilty.

There was a motion in arrest of judgment; but before it was argued, the President pardoned the defendant, and he died.

STEAM-PACKET COMPANY v. WILLIAM A. BRADLEY.

The criterion by which to decide whether two suits are for the same cause of action, is, whether the evidence properly admissible in the one will support the other.

Parol evidence of the object and intention of a party in entering into a written agreement, and of the circumstances which induced him to make the contract, is not admissible, if there be no ambiguity in the written contract.

ASSUMPSIT, upon the same cause of action as that in the case between the same parties in 9 Peters, 107, in which the judgment was reversed in January term, 1835, because it appeared by the record that the writ of *capias ad respondendum* was issued before the cause of action had accrued. The writ of error, upon which it was reversed, was issued in January, 1834.

While it was depending in the Supreme Court unreversed, the plaintiffs sued out the *capias ad respondendum* in the present suit, on the 24th of December, 1834. In January, 1835, the Supreme Court reversed the first judgment, and sent the cause back with an order to issue a *venire de novo*, and thus it stood until the 22d of June, 1838, when the plaintiffs directed a *non-pros.* to be entered.

On the 7th of March, 1836, the plaintiffs filed a declaration precisely like that in the former case; to which the defendant pleaded in abatement the pendency of the former suit.

To this plea the plaintiffs replied, in effect, that the writ in the former case issued before the cause of action accrued, and therefore the evidence to support the present action was improperly admitted in the former suit, and that the judgment of this Court in that suit was reversed by the Supreme Court upon that ground.

To this replication the defendant demurred.

Mr. Marbury, for the plaintiffs. The record in the former case shows that the plaintiffs had then no cause of action, and unless they could have recovered in that action, it is no ground of abatement of the present suit. But the former record is extinguished by the reversal before the plea pleaded, so that *nul tiel record* might have been pleaded. *Knight's case*, 1 Salk. 329; S. C., 2 Ld. Raym. 1014; *Marston v. Norris*, 1 John. Ca. 397.

Mr. Jones, contrà. The plaintiffs in the former suit had a good cause of action for the hire of the boat from the 20th of November to the 2d of December, 1831, the date of the first writ; and the present suit covers the same time. To that extent, the cause of action is the same in both causes. The error of this Court was, in instructing the jury that the plaintiffs could recover for the hire from the 2d of December to the 7th of February. The judgment of this Court was reversed, but a *venire de novo* was ordered; so that the record remains, although the judgment is reversed. The first action is still pending.

Mr. Bradley, on the same side, cited 2 Chitty's Pleadings, 469, for the form of the plea in abatement.

Mr. Coxe, in reply. There had been two suits brought by these plaintiffs, one against Mr. May, and one against Mr. Bradley, which had been settled or abandoned; and the parties agreed that a new suit should be docketed, to try the present question; but instead of docketing a new suit, the plaintiffs inadvertently filed their declaration in one of the former actions, in which the writ had issued prior to the present cause of action.

The plea should have shown that the plaintiffs might have recovered in the former action, to the extent claimed in the present action. If they could have recovered in the former only a part of what they now claim, the abatement can only go to that partial extent; and, having been pleaded to the whole of the present cause of action, it is bad.

If the contract was entire to pay in one sum for the whole detention of the boat from the 20th of November to the 7th of February, then the plaintiffs had no cause of action on the 2d of December, 1831, when the writ issued. But if the contract was to pay \$35 a day, *de die in diem*, then the plaintiffs had only a cause of action for the hire of the boat up to that day; but his cause of action now is for the whole time of the detention of the

boat, from November 20 to 7th February, so that the cause of action is not the same.

As to the time from the 2d of December to the 7th of February, the first suit would not protect the plaintiff's cause of action from the statute of limitations.

CRANCH, C. J. On the 2d of December, 1831, the writ in the first suit was issued, returnable to December term, 1831. The declaration contained two counts.

1st. *Indebitatus assumpsit* for \$2,765, for the use and hire of the steamboat Franklin.

2d. *Quantum meruit* for the hire and use of the same boat; and that they deserved to have therefor the sum of \$2,415.

The jury found a verdict for the plaintiffs for \$2,415, with interest from the 6th of February, 1832; and judgment was rendered accordingly.

The bill of exceptions taken at the trial in November term, 1833, shows that the plaintiffs claimed, and the Court instructed the jury, that if they believed certain facts therein stated, the plaintiffs were entitled to recover at the rate of \$35 *per diem* from the 20th of November, 1831, to the 6th of February, 1832, both days inclusive.

Upon a writ of error, the Supreme Court of the United States, at January term, 1835, reversed the judgment, and ordered a *venire de novo*, because it appeared by the record "that the jury was instructed to give damages to a time long posterior to the institution of the suit," the writ having issued on the 2d of December, 1831, and the defendant having appeared on the 1st Monday of December, 1831, and laid a rule on the plaintiffs to declare.

This error was not noticed in the Court below, or rather, as it seems, the record did not correspond with the facts, the parties having agreed, after the 7th of February, 1832, to docket a cause by consent; but as a writ had been issued on the 2d December, 1831, for a cause of action which was abandoned, the entries were made in the suit thus commenced on the 2d of December, instead of docketing a new suit according to the agreement of the parties.

While the same cause was pending in the Supreme Court upon the writ of error, to wit, on the 24th of December, 1834, the plaintiffs sued out a new *capias ad respondendum* against the defendant William A. Bradley; and on the 8th of January, 1836, filed their declaration thereupon, precisely in the same words as those of the declaration in the former cause.

To this new declaration, the defendant, on the 7th of March, 1836, pleaded, that before the issuing of the said writ in this cause, namely, at December term, 1831, the plaintiffs "impleaded the

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said defendant, and filed their declaration against him in a plea of trespass on the case of and upon the very same identical promises and undertakings in the said declaration in this present suit mentioned, as by the record and proceedings thereof remaining in the said court may more fully appear; in which said suit a trial was had and judgment therein by the said court rendered against the said defendant; from which said judgment the said defendant then and there prayed an appeal to the Supreme Court of the United States, in due form of law, which said prayer was granted, and the said cause was thereupon removed to the said Supreme Court, at the January term thereof, in January, in the year 1834; and the said defendant further says, that the parties in this and the said former action are the same, &c., and that the said suit so brought and prosecuted against him the said W. A. B. as aforesaid, was still pending in the said Supreme Court of the United States when the writ in this action was issued; and this the said W. A. B. is ready to verify, &c., and prays judgment of the writ and declaration, and that the same may be quashed."

To this plea, the plaintiffs replied, in substance, that the writ in the former case "issued prior to the rising of the cause of action in this case mentioned," and although the declaration in that cause did set forth the same cause of action as is set forth in the declaration filed in this case; yet, by the final judgment entered in that case, and which still remains in full force, it was adjudged that the said cause of action, not having arisen until after the issuing of the said writ, the evidence given to the jury in that case was improperly admitted; and the judgment of the said Circuit Court was, on that ground, reversed, "wherefore the plaintiffs say, that they ought not to be precluded from recovering in this action, by any thing in the said plea contained."

To this replication it is understood that the defendant demurs, and the plaintiffs join in demurrer.

The criterion by which to decide whether two suits are for the same cause of action, is, whether the evidence, properly admissible in the one, will support the other.

The Supreme Court has decided that the evidence which is admissible, and will, as we suppose, support the present action, was not admissible in, and, therefore, could not support, the former action. And it is equally clear, that so much of the evidence as might have been admissible in the former action, (namely, for the hire of the boat from the 20th of November up to the 2d of December, 1831,) and which might have supported so much of the plaintiff's claim, will not support the whole of the present claim.

I think, therefore, that the cause of action cannot in law be considered as the same.

If the contract is to be considered as for an entire sum, comprehending the thirty-five dollars a day from the 20th of November, 1831, to the 7th of February, 1832, then no part of the evidence in the former suit was applicable to that case. So that, taken in either way, I think the pendency of the former action cannot abate the present action.

MORSELL, J., concurred. THRUSTON, J., did not sit in the cause. Plea in abatement overruled.

Upon the trial of the general issue, the plaintiffs relied upon the same evidence which they produced on the former trial, (see the case reported in 9 Peters, 107, and 13 Id. 89,) and the defendant offered, and the Court again rejected, the same parol evidence to confine the contract to the time the navigation of the river should not be obstructed by the ice, which was offered and rejected at the former trial; and the Court gave the same instruction, at the instance of the plaintiffs, which they had given before.

The verdict and judgment being for the plaintiff, as in the former suit, the defendant carried the cause again to the Supreme Court, where the judgment was again reversed, on the ground that the Court ought to have permitted the defendant's parol evidence to be given to the jury. See 13 Peters, 89.

MILO MASON'S ADMINISTRATOR v. SERAPHIM MASI.

An indorser of a promissory note is a competent witness for the defendant in an action by the indorsee against the maker.

ASSUMPSIT, upon the defendant's promissory note to Nicholas Harper, and by him indorsed to the plaintiff's intestate.

Mr. Morfit, for the defendant, offered the indorser, Nicholas Harper, as a witness to prove payment by the defendant; and cited *White v. Kibling*, 11 Johns. 128; *Hooper v. Davis*, 1 Esp. 463; *Charrington v. Milner*, Peake's Com. 6, and Starkie on Ev. part 4, p. 300.

The COURT (THRUSTON, J., *contra*, and the other judges doubting,) permitted him to be sworn and examined, to prove payment by the defendant; and said they would hear a motion for a new trial if the verdict should be for the defendant.

Verdict for the plaintiff, \$50, with interest from the 25th of March, 1835.

Judgment for the plaintiff.

Negroes Bell and Williams v. McCormick.

NEGROES BACCHUS BELL AND JOSEPH WILLIAMS v. ALEXANDER MCCORMICK.

No implied emancipation arises from a legacy of twenty-five dollars bequeathed to slaves who are ordered by the will to be sold.

BENJAMIN PRATHER, of Prince George's county, in Maryland, by his last will, made in 1836, after devising his real estate to his grandson, B. B. Nichols, and sundry pecuniary and specific legacies to several of his relations and friends, proceeds thus: "My will is, that my two servants, Robert and Sarah, immediately after my decease, be set at liberty, and forever free from slavery, and that my executor pay, out of my estate, to the said Robert, the sum of fifty dollars, and to the said Sarah the sum of twenty-five dollars. Item, I will all the rest of my negroes, namely, Bacchus, Joseph, Bill, Dorsey, Hanson, Ann, John, Martha, and Rachel, be sold under the following provisions: that is, none of the said negroes shall be sold to any person residing out of Prince George's county, without their own consent; and in all cases they shall have the liberty of choosing their masters. All the rest and residue of my estate I will to be sold to the best advantage, and the proceeds of such sales, as well as the proceeds of the sale of the negroes above-mentioned, (after paying to the said Bacchus, Joseph, Bill, Dorsey, Hanson, and Ann, the sum of twenty-five dollars, which I hereby require and authorize my executor to pay, as well as all other legacies,) to be equally divided between my two daughters Rachel and Eliza, share and share alike."

The present suit was brought by Bacchus and Joseph, two of the negroes named in the will.

It was agreed by the counsel of the parties, that, independent of the specific devises and legacies the testator left assets, sufficient to pay his debts, without resort to a sale of the negroes, and to leave a *residuum*; and that the petitioners had demanded their legacies of twenty-five dollars each, of the executor, who refused to pay them.

Mr. W. L. Brent and Mr. R. J. Brent, for the petitioners, contended that a legacy to a slave is an implied emancipation, because, while a slave, he cannot hold the money a moment. It instantly becomes the money of his master. He can give no receipt, nor release; nor can the executor have credit for it in settlement of his administration account. When a right is given by a master to his slave, he is presumed to give all the means of his enjoyment of it. If the will contain inconsistent devises, or bequests, the last must prevail. The legacies are not to be paid

out of the proceeds of the sales of the negroes only, but out of the general fund to be created by the sale of the negroes and other property, and there was more than enough to pay all the debts and legacies, without resort to the sale of the negroes. 1 Thomas' Co. Lit. 430; *Oatfield v. Waring*, 14 Johns. 192; *Hall v. Mullen*, 5 Har. & Johns. 194; *Le Grand v. Darnall*, 2 Peters, 670; *Ulrich v. Litchfield*, 2 Atk. 374.

Mr. Bradley, contra. There can be no implication against the express language of the will. The testator expressly manumits some of his slaves, but directs these to be sold to such masters as they should choose, and out of the proceeds they were to be paid \$25 a piece.

Mr. Mennifree, of Kentucky, on the same side. The donation of \$25 a piece to the slaves is not, in law, a legacy, but a mere benevolence. This construction reconciles all the clauses of the will. It is manifest that the testator did not intend to manumit these slaves; but to do them a gratuitous kindness. So also the right given them to choose their masters, was not a legal right, but a mere benevolence without a corresponding right, a gratuity, a direction to the executor.

The COURT (*nem con.*) was of opinion that the petitioners were not entitled to freedom under the will. That an implied emancipation cannot be inferred in direct opposition to the express order of the testator to his executor to sell them.

R. H. FOOTE, one of the Executors of Thomas Whittington, v.
WILLIAM NOLAND.

If a sealed note be given to R. H. F., one of the executors of Thomas Whittington, it is not necessary that all the executors should join in the action.

DEBT on a sealed note for \$60, payable to R. H. Foote, one of the executors of Thomas Whittington.

Mr. R. J. Brent, for the defendant, contended that it is to be presumed from the face of the note, that the money belonged to the estate of the testator; and that there were other executors who ought to be joined as plaintiffs; and prayed the Court to instruct the jury that the plaintiffs alone cannot recover; but that all the executors ought to join whether they proved the will or not.

Mr. Bradley, contra, cited *Biddle v. Wilkins*, 1 Peters, 686, 692.

The COURT (THRUSTON, J. absent,) refused.

Verdict for plaintiff. New trial granted, because the verdict was against the evidence.

UNITED STATES, for the use of the Chesapeake and Ohio Canal Company, v. JAMES WILLIAMS.

An action will not lie upon the official bond of the Marshal of the District of Columbia, for not returning an execution, unless he has been required by rule of Court to return it, and has failed so to do.

DEBT on the official bond of the Marshal of the District of Columbia. The declaration was in the usual form for the penalty of \$20,000, with a profert of the bond, the condition of which, upon oyer, appeared to be, "that if the said Henry Ashton" (the marshal) "do and shall, by himself, and his deputies, well and faithfully perform and fulfil all the duties of the said office of marshal of the said District of Columbia, in pursuance of, and according to, the Acts of Congress in such case made and provided," then the obligation to be void, otherwise of full force and virtue in law; dated February 7, 1831.

The defendant pleaded general performance. The plaintiffs replied specially, setting forth, as breaches of the bond, that sundry executions, particularly described, being writs of *fiery facias*, issued in favor of the Chesapeake and Ohio Canal Company, against divers individuals, for divers sums of money; and averring as to each execution, that it "was delivered into the hands of the said Henry Ashton, as marshal aforesaid; that the said Henry Ashton ought to have made a true and lawful return thereto; but the plaintiffs aver he wholly neglected so to do, and that the said judgment is still wholly unsatisfied and unpaid to the said company, contrary to the form and effect of the said condition of the said writing obligatory." To this replication the defendant demurred generally.

Mr. Bradley, for the defendant, contended that the marshal is not liable to an action upon his bond for not returning an execution, unless he has been ruled by the Court to return it, and amerced for not returning it, according to the law of Maryland, 1794, c. 4, § 1, which is in force in this county. That the statute is not cumulative, but exclusive. It is the only mode of proceeding against the marshal; and if a rule is necessary to charge the marshal; *à fortiori* to charge the surety. The default of the marshal must be judicially ascertained, to justify an action upon his bond. Watson's Sheriff, 63, 64, 82, 198, 203; 2 Inst. 452; *Cheasley v. Barnes*, 10 East, 73; *Allred v. Halliwell*, 1 Starkie, 95; *The People v. Striker*, 18 Johns. 391.

Mr. R. J. Brent, *contra*. This question depends on the 27th section of the Judiciary Act of 1789. The oath of the marshal makes it his duty to make true returns of all lawful precepts to

him directed ; and the statute gives an action upon the bond for every breach of his duty.

The Act of Maryland, 1794, c. 54, is only applicable to the sheriffs of Maryland. 1 Com. Dig. tit. Action for Misfeasance, A. 2, American Ed. ; *Hinman v. Brees*, 13 Johns. 531 ; *McCubbin v. Orme*, 1 Har. & McHenry, 194 ; *Barton v. Webb*, 8 T. R. 459 ; *People v. Birdsall*, 20 Johns. 298.

Mr. Bradley, in reply. No action will lie against the marshal for not making the money, nor for a false return, until the execution is returned ; nor for not returning it until called on by the court to return it, and failing so to do, and his default entered upon the record. A *feri facias* is not a returnable writ. *Watson's Sheriff*, 203. *Moreland v. Leigh*, 2 Starkie's Cases, 388.

The COURT (*nem. con.*) gave judgment for the defendant on the demurrer ; upon the ground that the marshal is not liable upon his bond for not returning a *feri facias*, unless he has been called upon by the court to return it, and has refused.

W. G. W. WHITE v. CLARKE AND BRISCOE.

When a decree for the surrender of certain promissory notes, and the payment of a certain sum of money is affirmed by the Supreme Court of the United States, with costs and damages at the rate of six per cent. per annum, and the cause is remanded to the Circuit Court by mandate commanding that court " that such execution and proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding ; " and the Court thereupon orders the defendants, without further delay to bring the notes into court to be cancelled, and the sum of money mentioned in the decree with interest thereon, and the costs of this suit and the costs in the Supreme Court, to be paid to the complainant, the defendants cannot supersede this order to comply with the decree which had been appealed from, nor stay execution upon that decree by confessing a judgment out of court, under the Maryland Act of 1791, c. 67, § 1 ; more than two months having elapsed since the original decree was rendered.

The Court will not issue an attachment upon a decree for payment of money, but will leave the complainant to his remedy by *feri facias*, or *ca. sa.*

THE decree of this Court in this cause, (*ante*, 102,) having been affirmed by the Supreme Court of the United States, at January term, 1838, with costs, and damages at the rate of six per cent. per annum ; and a mandate having been filed on the 6th of April, 1838, commanding this Court " that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding," the COURT, on the 11th of April, 1838, upon the motion of the complainant's counsel, after reciting the decree which had been the subject of the appeal, and which had been affirmed, and by which the defendants, Clarke and Briscoe were

White v. Clarke and Briscoe.

required without delay to bring into this Court to be cancelled, certain promissory notes signed by the complainant, and particularly described in the bill, and to pay to the complainant the sum of \$1,083.55, with interest from the date of the decree, and the costs of this suit, passed an order "that the said defendants, Clarke and Briscoe, without further delay bring the notes aforesaid into this Court to be cancelled, and the said sum of money with interest thereon, and the costs of this suit, and the sum of \$142.88, the complainant's costs in this suit in the said Supreme Court, to be paid to the said complainant."

This order was served upon the defendants on the 19th of April, and on the 19th of June, 1838, the complainant obtained a rule upon the defendants to show cause on Thursday the 21st of June, why an attachment should not be issued against them for having failed to comply with the order of the Court of the 11th of April.

Upon the return of the rule, the defendants, showed, for cause, the following paper which they had filed on the 21st of April, as a *supersedeas* to the decree.

"District of Columbia, Washington county, to wit: You, Joseph S. Clarke and Richard G. Briscoe, Walter Clarke and James T. Clarke, do confess judgment to William G. W. White, for the sum of one thousand and eighty-three dollars and fifty-five cents, with interest from the tenth day of June in the year of our Lord one thousand eight hundred and thirty-seven till paid, and costs of this suit; to wit, one hundred and forty-seven dollars and fifty-eight cents, and one hundred and forty-two dollars and eighty cents, the costs in the Supreme Court, and the additional cost thereon, which sums were recovered by the said William G. W. White against the said Joseph S. Clarke and Richard G. Briscoe, on the eleventh day of April, in the year of our Lord one thousand eight hundred and thirty eight, by a decree of the Circuit Court of the District of Columbia, sitting as a court of equity for Washington county aforesaid; the said sums of money to be levied of your bodies, goods, and chattels, lands and tenements for the use of the said William G. W. White in case the said Joseph S. Clarke and Richard G. Briscoe shall not pay and satisfy to the said William G. W. White the said sums of money so as aforesaid recovered against them with the additional cost thereon, on the twenty-first day of October next.

"Taken and acknowledged before us, the subscribers, two of the justices of the peace of the United States of America, in and for the county of Washington and district aforesaid, this twenty-first day of April, eighteen hundred and thirty-eight.

"W. THOMPSON, J. P.

"CLEMENT T. COOTE, J. P."

Bank of Alexandria v. Dyer.

The notes were brought in by the defendants, to be cancelled.

Mr. Hoban, for the defendants, contended that the order of the 11th of April, 1838, was a new decree, which the defendants had a right to supersede, under the Maryland Act of 1791, c. 67, § 1.

Mr. Marbury and *Mr. Key*, for the complainant, *contrà*. The decree which was affirmed was passed on the 10th of June, 1837, and it is that decree which the Supreme Court has commanded this Court to execute. This Court cannot now reverse or alter it, except to add the costs according to the mandate.

The right to supersede is limited to two months after the decree; which two months had long since elapsed.

The appeal was a *supersedeas*; but it was removed by the decree of affirmance; the complainant cannot have a second *supersedeas*.

The COURT (THRUSTON, J., *contrà*,) was of opinion that the defendants could not now supersede the decree.

Mr. Marbury then moved for an attachment; but the COURT refused, and told him he might have a *fieri facias*, or *ca. ca.*

FREDERICK BARNARD v. BENJAMIN O. TAYLOE.

Not guilty within three years, is a good plea in trover.

TROVER; plea, not guilty within three years. General demurrer.

Mr. Hoban, for the defendant, contended that the plea should have been *actio non accrevit*; and cited the case of the *Union Bank v. Chason*, at November term, 1835, (not reported); *Dyster v. Battye*, 3 B. & A. 448; and *Richmond v. Richmond*, 3 Halstead, 55.

Mr. Key, *contrà*, cited the case of the *Bank of Columbia v. Ott's Administrator*, in this Court, (2 Cranch, C. C. 575.) The Maryland Act of Limitations of 1715, and Evans's Harris's Ent. 48.

The COURT (*nem. con.*) overruled the demurrer.

BANK OF ALEXANDRIA v. EDWARD AND FRANCIS C. DYER.

The county of Alexandria in the District of Columbia, is not beyond seas, as to the county of Washington in the same district.

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. The defendants pleaded *non-assumpsit*, and the statute of limitations of Maryland, (1715, c. 23.)

Bank of Alexandria v. Dyer.

The plaintiffs replied, that at the time of making the promise "they were in the county of Alexandria in the District of Columbia, beyond the seas, and so in the county of Alexandria, beyond the seas, remained and continued until the day of the impetration of the original writ aforesaid, to wit, at Washington county aforesaid; and this they are ready to verify," &c.

To this replication the defendants demurred.

Mr. R. S. Coxe, for the plaintiffs. Alexandria county and Washington county, are governed by different laws; as much so as Virginia and Maryland. This point has always been so decided by this Court, in the removal of slaves from one county to the other. When two places are under different sovereignties, they are beyond seas as to each other.

The laws of Alexandria and Washington are derived from different sovereignties; and those laws are specially continued in force in the respective counties, by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103.] *Shelby v. Guy*, 11 Wheat. 361.

Mr. W. L. Brent, contra. The savings in the statute do not apply to a bank; such as non-age, coverture, and imprisonment. A bank has no residence. The replication merely says that the plaintiffs were in Alexandria county when the promise was made.

Mr. Bradley, on the same side. The judicial jurisdiction of the two counties is the same; and by the Act of Congress of the 24th of June, 1812, § 5, [2 Stat. at Large, 755,] executions may be served in either county. Scotland is not beyond seas in respect to England. Byles on Limitation, 193; *LeRoy v. Crowninshield*, 2 Mason, 151.

Mr. Coxe, in reply. If this case had happened before the 27th of February, 1801, the replication would have been good. The Act of Congress of that date continues the laws of the two counties as they were before; if so, the plaintiffs have the same rights as if the jurisdiction had not been changed. If the replication was good before 1801, it is good now. It is no objection that the bank cannot have the benefit of all the exceptions of the statute; and it is no reason that the bank cannot have the benefit of some, because it cannot have the benefit of all. A corporation has a residence, a commorancy. *United States v. Amedy*, 11 Wheat. 392. The *lex fori* is the rule. If it depend upon the jurisdiction of the country, "beyond seas" could not be pleaded in any of the circuit courts of the United States, when the plaintiff resided in a different State. Upon a cession of territory, the laws remain until changed by the new sovereign.

The COURT (MORSELL, J., *contra*.) sustained the demurrer; being of opinion that the replication was insufficient.

OWEN CONNOLLY v. THOMAS J. BELT AND RAPHAEL SEMMES; and
THOMAS J. BELT v. JOHN PICKERELL, RAPHAEL SEMMES, and
OWEN CONNOLLY.

If the property of a debtor be sold under a deed of trust, to a greater amount than the debt, the surplus cannot be enjoined and stayed, in the hands of the trustee, to answer damages which the plaintiff may recover against the debtor at law, for not delivering up the possession of the property according to his agreement, unless the debtor is insolvent.

If the terms of a deed of trust be, that if the debt be not paid at the time appointed, the trustee shall sell the property; and it be sold accordingly; the sale will not be set aside because a sale of part of the property would have been sufficient to raise the money, especially if the property consist of a single lot of ground, and there are subsequent incumbrancers who agree that the whole shall be sold.

The trustee, in such case, cannot sell a part only, without the consent of all parties concerned.

A sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee; there being no law requiring him to be personally present at the auction.

A complainant is not entitled, under the prayer for general relief, to a decree inconsistent with his own statement in his bill.

The relief granted must always be consistent with the allegations in the bill.

If the complainant cannot support his bill upon the grounds which he has assumed, the bill must be dismissed.

THESE causes were heard together, on the bills, answers, general replications, and evidence.

Mr. R. S. Cox and *Mr. Jones*, for Thomas J. Belt, contended, that the sale made under Belt's deed of trust, was void, and ought to be set aside, because,

1. The trustee was not personally present at the sale.

2. That the whole lot was sold, when the sale of a part only would have been sufficient to pay the debt due to Pickerell under the deed of trust.

3. That it was sold for \$1,620, when the price limited by consent of the creditors was \$1,800.

In support of the 1st objection, *Mr. Cox* cited the case of *Heyer v. Deaves*, 2 Johns. Ch. Ca. 154, and in support of the second he cited the case of *Delabigarre v. Bush*, 2 Johns. 490.

Mr. C. Cox was of counsel for the other parties.

The case is fully stated in the opinion of the COURT, which was delivered by CRANCH, C. J., (THRUSTON, J., absent.)

The bill of Owen Connolly states that he purchased lot No. 3, in square No. 403, in Washington, at a sale made by Raphael Semmes under a deed of trust from Thomas J. Belt to the said Raphael Semmes, to secure a debt due to John Pickerell, from whom Belt had purchased the lot. That by the deed of trust, it was the duty of the trustee, in a certain event, "to sell the premises at public auction, after giving twenty days notice, at such

time and place, and upon such terms and conditions as the said trustee shall deem most for the interest of all parties concerned in said sale. That he sold accordingly with the assent of Belt, who promised to deliver up possession of the premises to the plaintiff on the 1st of February thereafter, on the faith of which the plaintiff paid the purchase-money, \$1,620; but Belt refused to deliver up the possession; whereupon the plaintiff brought his action at law for damages for not delivering possession according to his promise; and also an ejectment, in the name of Raphael Semmes, the trustee, to recover the possession. That there will be a surplus of purchase-money in the hands of the trustee, after paying all liens and expenses, of from \$360 to \$400, payable to Belt. The bill suggests his insolvency, and prays for an injunction to stay that surplus in the hands of the trustee, to satisfy the damages and costs which the plaintiff may recover in his action at law, and for general relief.

The main object of this bill, and the relief prayed, is to stay the surplus in the hands of the trustee, to meet those damages and costs; and I do not see that any other relief can be granted upon the bill; and even that relief depends upon the insolvency of Belt; for upon no other ground can the Court be justified in detaining it from him.

The answer of Belt positively denies his insolvency; and this answer, being responsive to the allegation of the bill, must be taken to be true, and thus takes away all ground of relief. Doctor Dawes, indeed, says in his deposition, that he believes that the pecuniary circumstances of Belt were bad at the time of the sale. He had two small judgments against him, which were unpaid. But this evidence is not sufficient to rebut the positive denial in the answer.

The answer, it is true, denies the validity of the sale, because made for less than the price limited by the verbal agreement at the time of sale. But this is unimportant, as the plaintiff does not seek to have his purchase confirmed. His complaint is, that Belt will not surrender the possession; but for this he has sought his remedy in another forum, in a court of law, and therefore cannot now ask it in equity. If the plaintiff recovers judgment for his damages and costs at law, the law is competent to enforce it. The only equity in the bill, is the supposed insolvency of Belt, and that is denied in the answer, and not supported by sufficient evidence. I think, therefore, that this bill of Connolly against Belt and Semmes should be dismissed.

The cross-bill of *Belt v. Pickereil, Semmes, and Connolly*, seeks to avoid the sale to Connolly,

1. Because the conditions of said deed of trust were not com-

plied with, "inasmuch as the property was not offered for sale at such time and place, and upon such terms and conditions, as the trustee thought most advantageous to all parties concerned."

This averment is directly and positively denied by the answer of the trustee, and this denial being responsive to the allegation in the bill, is evidence.

2. Because the whole lot was sold, when a part would have satisfied this incumbrance of Pickerell's; and although he was requested to offer the corner division of the lot for sale to satisfy his lien.

The fact that a proposition was made by the friends of Mr. Belt to Mr. Pickerell, to sell only a part of the lot, seems to be supported; and also that a sale of that part of the lot would have produced money enough to satisfy the claim of Mr. Pickerell; but it is evident that the subsequent incumbrancers would have proceeded against the residue of the lot, at an increased expense; and it is very doubtful whether it would have produced as good a price, thus divided, as if sold entire. There was no obligation upon the trustee thus to divide it; nor had he authority so to do, without the consent of all who were interested in the property, including the subsequent incumbrancers. His duty, under the deed of trust, was to sell "the premises," not a part of the premises.

The case of *Delabigarre v. Bush*, 2 Johns. 490, was upon a common mortgage, and one of the questions was, whether the Court, in the exercise of its equitable jurisdiction, upon the foreclosure of the mortgage, should order the whole of the mortgaged premises to be sold, or only so much as should satisfy the mortgage debt.

The premises consisted of two farms, the property of the mortgagor, and sundry city lots, the property of his wife. The Court decided that it was not "a matter of course to order a sale of all the mortgaged premises." "That there can, perhaps, be no general rule upon the subject; each case must depend upon its own circumstances." Considering that a sale of the whole of the mortgaged premises might materially injure the wife of the mortgagor, by converting her real estate into personal, whereby, if not necessary to pay the debt, it would become the absolute property of her husband, the Court of Errors reversed the decree for the sale of the whole, and ordered the husband's property to be first sold; and if that should not be sufficient, then so much of the wife's as should be necessary.

The present case is not that of a common mortgage, but a deed of trust, where the trustee is bound to pursue his powers strictly; and although a court of equity would probably sanction a sale of

part only, yet the deed of trust itself authorizes and requires the trustee to sell "the premises;" and where there was a contest between the *cestuis que trust* whether he should sell the whole, or a part only, his safest course, perhaps, was to sell the whole, especially as it consisted of a single lot. His refusal to yield to the wishes of the debtor in that respect, contrary to those of the creditor and subsequent incumbrancers, cannot make the sale void as against the purchaser, who had nothing to do with that question, and who was encouraged to bid, by the debtor himself.

3. The third ground for avoiding the sale, as urged by Mr. Belt, in his cross-bill, is, that it was agreed on the day of sale, that the property should not be sold under \$1,800, but it was knocked off to Connolly at \$1,620.

But this allegation is not sustained by the evidence, and the objection therefore fails.

Another objection was made in the argument, but not suggested in the bill, namely, that the sale was void because the trustee, Mr. Semmes, was not personally present. This objection was not made at the sale. In support of it, the case of *Heyer v. Deaves*, 2 Johns. Ch. Rep. 154, was cited. That was a sale of mortgaged premises, made under a decree of the Court of Chancery of New York, in the absence of a master, who, being sick, did not attend, but deputed a competent agent, who attended and sold the land.

The statute of that State requires "that all sales of mortgaged premises, under a decree, shall be made by a master." The Chancellor says: "The statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under, or deputy-master, is not an officer known in law." Neither that statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms, and conditions, were such as were deemed by the trustee most for the interest of all the parties concerned in the said sale, as appears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be personally present at the auction.

No objection having been made by Mr. Belt, or his friends, on account of the absence of Mr. Semmes, the trustee, who was represented by Mr. C. Cox, as his agent, at the sale, and their suffering the sale to go on, is, I think, a waiver of the objection; it would have been otherwise valid. But the objection, in itself, is of no avail.

If the sale was valid, it is not important in this suit to inquire how the trustee has applied the purchase-money. The bill seeks

to avoid the sale altogether, and does not ask for a decree for the surplus money in the hands of the trustee ; and the plaintiff is not entitled to such a decree under the prayer for general relief ; for it would be inconsistent with his own statement of his case. The relief granted must always be consistent with the allegations of the bill. If the sale was void, as the plaintiff contends, he is not entitled to any part of the proceeds of the sale ; and if he cannot support his bill upon the grounds which he has assumed, it must be dismissed.

Upon the whole, I think both bills must be dismissed.

MORSELL, J., concurred.

NEGRO GEORGE COOTS v. MARY MORTON'S EXECUTOR.

The petitioner claimed freedom under the following clause of the testatrix's will : " I will that George, if he behaves well until the year 1837, and continues to hire for good wages, shall, at the end of that year, be free." *Held*, that it was competent for the defendant to show, that the petitioner did not behave well, &c., but ran away.

PETITION for freedom under the following clause of Mary Morton's will : " I will that George, if he behaves well until the year 1837, and continues to hire for good wages, shall, at the end of that year, be free."

Mr. Marbury, for the defendant, offered evidence to prove that the petitioner ran away, and that the defendant had to expend two hundred dollars to get him back again.

Mr. Dandridge and *Mr. Bradley*, for the petitioner, contended that the condition was only *in terrorem*, and objected to the evidence.

But the COURT (*nem. con.*) overruled the objection, considering the good behavior as a condition precedent.

Verdict for the petitioner.

MIDDLETON'S LESSEE v. REZIN SINCLAIR.

In 1823, the Commissioner of the Public Buildings in Washington had authority to take the acknowledgment of deeds of land in Washington county.

A purchaser under an execution against the grantor has a right to show the deed to be fraudulent as to the creditor under whose execution he purchased. Although there is a variance, in some respects, in the description of the land in the two deeds, they may be given in evidence to the jury, who may decide the question of identity.

A conveyance to his son, by a father, of all his estate and effects, while indebted, and continuing in possession after the conveyance, is evidence of intent to hinder, delay, and defraud his creditors.

EJECTMENT for land in the county of Washington, D. C. The

plaintiff offered in evidence a deed from Smallwood C. Middleton to his son Samuel Middleton, under whom the lessors of the plaintiff claimed title. This deed was dated February 24th, 1823, and acknowledged before Mr. Elgar, the commissioner of the public buildings, who succeeded to the office of superintendent, who succeeded to the office of the commissioners appointed under the Act of Congress of the 16th of July, 1790, [1 Stat. at Large, 130,] who were severally authorized to take such acknowledgments, by the Maryland Act of 1791, c. 45, §§ 7 and 8. When the board of commissioners was dissolved by the Act of Congress of 1st of May, 1802, [2 Stat. at Large, 175,] entitled "An Act to abolish the board of commissioners in the city of Washington, and for other purposes," the office of superintendent was created, to whom was transferred all the powers of the commissioners, and by the Act of the 29th of April, 1816, c. 150, §§ 2 and 5, [3 Stat. at large, 324,] the office of superintendent was abolished and that of Commissioner was established, to whom were transferred all the duties of the old board of commissioners, and of the superintendent.

Mr. Morfit and *Mr. Key*, for the defendant, objected to the admission of the deed in evidence, and contended that the commissioner for the public buildings had no authority to take the acknowledgment; that he succeeded only to the powers of the commissioners as a board, and not to any powers given to the commissioners severally. The Maryland Act of 1791, c. 45, § 8, says, "That acknowledgments of deeds" "made before and certified by either of the commissioners, shall be effectual." The Act of Congress of the 1st of May, 1802, § 2, [2 Stat. at Large, 175,] says, "And the said superintendent is hereby invested with all powers, and shall hereafter perform all duties which the said commissioners are now vested with, or are required to perform, by, or in virtue of any act of Congress, or any act of the General Assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city, or in any other manner whatsoever." And by the second section of the Act of Congress of the 29th of April, 1816, c. 150, [3 Stat. at Large, 324,] it is enacted that the Commissioner of the Public Buildings "shall perform all the duties with which the said three commissioners" (appointed under the Act of 16th of July, 1790,) "were charged;" and by the 5th section of the same act of 29th April, 1816, it is enacted that the duties of the office of superintendent thereby abolished "shall be performed by the commissioner to be appointed by virtue of this act."

The commissioner, therefore, had only the powers given to the first commissioners as a board.

The COURT, however, (THRUSTON, J., absent,) overruled the objection, and said that the point was settled in the case of *Peltz v. Clarke*, in this Court at May term, 1826, (2 Cranch, C. C. 703,) and they were not disposed to disturb that decision.

Mr. Bradley, for the plaintiff, then contended, that the defendant, being neither a creditor of Smallwood C. Middleton, the grantor, nor a subsequent purchaser from him, was not competent to object to the validity of the deed as being fraudulent; for, if fraudulent, it is so only as to creditors and subsequent purchasers.

But the COURT (THRUSTON, J., absent,) overruled the objection; because the defendant does not claim in the character of a subsequent purchaser; but claims under a judgment and execution in favor of a creditor who had furnished materials for a building erected upon the land in dispute before the date of the deed; and if the deed was void as to that creditor the sale under the execution was valid, and the defendant, who claims under that sale has a good title.

The defendant, in order to show his right as a creditor, or as claiming under a creditor, offered in evidence a judgment, *feri facias*, and sale in 1827, in an action by King and Langley against the grantor, Smallwood C. Middleton, and that the cause of action originated before the date of the deed. That the land was sold under the *feri facias* to one C. King, who conveyed to a Mrs. Bryan, under whom the defendant claims title.

The description of the land in the deed from the marshal differs, in some respects, from that in the deed from S. C. Middleton to his son in 1823; the beginning, however, is the same.

Mr. Bradley objected to that evidence on account of this difference in the description of the land.

But the COURT (*nem. con.*) permitted the evidence to go to the jury.

Mr. Key, for the defendant, then prayed the Court to instruct the jury, that if they should believe from the evidence that the said S. C. Middleton at the date of the said deed to his son was indebted to the said King and Langley, and that after the said deed he continued in possession of all the property mentioned in the said deed until the said sale under the said execution of King and Langley, and the said purchase by Mrs. Bryan as aforesaid, and that he had no other property; then such indebtedness, and such continuing in possession, is evidence of the said deed's being made by the said S. C. Middleton to his son, with intent to hinder, delay, and defraud his creditors; and that upon the said evidence of such intent, if believed by the jury, the plaintiff is not entitled to recover in this action.

And the COURT (*nem. con.*) so instructed them; and also at the

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prayer of *Mr. Bradley*, for the plaintiff, further instructed them, that if from the evidence they should be of opinion that the said deed was made *bonâ fide*, and without any intent to defeat or defraud the creditors of the said S. C. Middleton, and for a valuable consideration ; and the said Samuel Middleton, (the son) was jointly in possession of the said land, with the said Smallwood C. Middleton after the making of the said deed, then the plaintiffs are entitled to recover.

Verdict for the defendant.

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If the goods of several persons are stolen at the same time, the stealing of each person's goods constitutes a distinct offence, and may be the subject of a distinct and separate indictment ; but they may be joined in one indictment ; and whether they shall be prosecuted jointly or separately, is properly left to the discretion of the Attorney of the United States.

THE grand jury found five separate indictments against the defendant for larceny in stealing the goods of five different persons ; the property stolen being in each case, of the value of five dollars and upwards.

In each indictment the offence was stated to have been committed on the 4th of March, 1838.

On the 5th of April, the defendant was found guilty in each case ; and on the 21st of April, the COURT sentenced him to the penitentiary for one year in each case.

THRUSTON, J., concurred in the judgment in the first of the five cases, but dissented in the other four cases ; and on the 30th of April, read in court, and directed the clerk with the leave of the court to file the following opinion :

In this case, the traverser is convicted on five separate indictments, for stealing certain articles of clothing from a boarding-house on Pennsylvania Avenue, belonging to sundry boarders in that house.

Upon these several indictments the majority of the court sentenced the convict to five years' imprisonment in the penitentiary in this district, to hard labor, &c., in pursuance of the Act of Congress, in such cases made and provided ; that is to say, for one year on each several indictment. I concurred in the first sentence only, and refused to concur in the other four sentences, because, from the evidence on the trial of the several indictments, it seemed to me that although the goods stolen belonged to five different persons, it appeared they were all taken at one and the same time ; or, at least, that there was no evidence that they were

taken at several times, and not at the same time; and the said five indictments charge the goods to be all taken on the same day.

Now the grounds of my refusal to concur with the Court in more than one sentence against the convict, are the following :

1. That the common law of England being adopted by the State of Maryland, and declared in the 3d article of the Bill of Rights to be the law of Maryland, it is a well established maxim of that law that "*Nemo debet bis puniri pro eodem delicto.*"

2. That the stealing of goods, at one and the same time, belonging to different persons, is but one act of larceny.

3. That the penitentiary law affixes to larceny of money, goods, &c. above the value of \$5, the maximum punishment of only three years confinement in the penitentiary.

4. That this Court has decided, in the case of *The United States v. —*, a colored woman, who stole two articles, namely, a coat from one scholar, and another garment from another scholar at Holbrook's school, in Alexandria, and both charged in the same indictment, that the indictment was good, and actually sentenced the woman to the penitentiary for three years upon a conviction on the said indictment.

5. Then, if the goods, stolen at one time, belong to different persons, this Court has settled the law, that it is but one offence, and that such indictment, charging the goods stolen to belong to different persons, is good.

6. If so, then, where the goods stolen at one time, belong to different persons, one indictment is sufficient; and if one is sufficient, to harass and oppress the accused with more than one is oppressive and vindictive, and against the maxim above quoted, and against common justice and common sense.

1st. As to the first grounds of reasons for dissenting from the Court; the common law as well as the Bill of Rights of Maryland, and the Constitution of the United States, have carefully protected the personal liberty of the citizens, by many provisions, too obvious and familiar to require specification; and the Constitution of the United States, moreover, especially protects the citizens against "cruel and unusual punishments," and the common law against a double punishment for the same offence.

2dly. That the stealing of goods, at one and the same time, although the property of different persons, is but one act of larceny, and subjects the offender to but one punishment. To make it a distinct larceny for each owner of the stolen goods, is a mere technical rule, totally repugnant to the words and spirit of the penitentiary act, against common sense and common justice, and

against the foregoing maxim of the common law, the Bill of Rights of Maryland, and the Constitution of the United States.

What is an act of larceny? When the larcener contemplates the commission of a theft to the extent of the theft actually committed and proved, no matter how many persons the stolen goods may belong to, it is the consummation of a single intent only; as in the case of

tried in this Court, and convicted and punished for four separate larcenies, merely because the goods, valued at \$20, were the property of four different persons; the case was, he went into a gentleman's house, on the night of a party there, snatched up a bundle of cloaks, hats, &c., and for this he was punished with three years' confinement in the penitentiary, and some time also in the common jail, because one of the articles stolen was under the value of \$5; thus receiving four distinct and separate punishments for one act of larceny. It is true he was confined in the penitentiary for only three years, which is the maximum of punishment for one single offence; but the court, with the sense they entertained of the character of the offences, might have sentenced him for nine years to the penitentiary; but even in inflicting the minimum confinement for larceny of three years confinement only, they did not exceed their power, if viewed as one act of larceny only, still the conviction and sentence as for a fourth offence of larceny to the common jail for a certain period (one month, as far as my recollection serves,) did exceed the measure of punishment allowed by law, according to my view of the case, in deeming the stealing of goods in one act and at one time as only a single larceny, no matter how many proprietors there might have been of the goods stolen; but to illustrate further my sense of the distinction between what constitutes a single larceny and many larcenies committed by the same person, I argue in this way: if a thief contemplates stealing certain goods belonging to different persons, and carries his intent into execution, at one and the same time, or at least, by one continuous operation, it is but one offence, and subject to but one punishment. For instance, take the case of the party, the subject of this opinion, the German; he stole sundry articles of clothing from the boarders at

boarding-house, belonging to different persons, the whole together to the value of some sixty or seventy dollars. Did he take these articles at one time, or by one continuous operation, and pursuant to one preconceived intent, or at different times, and in pursuance of separate and distinct intents? or, in other words, did he steal from one boarder only, and in pursuance of a preconceived intent to steal from that person only, and then steal from another in execution of another distinct intent conceived after the consummation of the first larceny, and

so on with the larcenies committed on all the boarders, with the stealing from whom he was charged? If he stole from all of them with a preconceived intent so to do, at one time, or by one continuous operation, I say, notwithstanding the alleged technical rule above mentioned, it constituted but one larceny; if the second way just mentioned, the acts constituted separate and distinct larcenies. In order to estimate properly the soundness of this doctrine, in contrast with the view taken of the law by the other two judges, let us test them by the Penitentiary Act, the Bill of Rights of Maryland, the Constitution of the United States, reason, justice, and common sense. The Penitentiary Act was based upon the principles of apportioning punishments to crimes; of equalizing them, and hence the distinction between larcenies under five dollars' value and those above; and hence the scale graduating punishments to crimes, according to the view Congress entertained of their specific enormities. It is true they made no distinction in the punishment of larcenies over the value of five dollars, between the lowest sum above five dollars, and the highest, because such minute distinctions would have overcharged the act with matter not meriting such tedious details; but have left the courts to graduate the punishment in the range submitted to their discretion, between the minimum and the maximum periods of confinement.

How does it comport with this humane and benevolent design of the act, for this Court to adjudge that where goods are stolen at one time, or by one continuous operation, and in pursuance of one preconceived intent, from various owners, that because they belonged to various owners merely, it gave them discretion to sentence the larcener to fifteen years' confinement in the penitentiary, for goods stolen not exceeding in value some sixty or seventy dollars, when, if they belonged to one person, and the stolen goods were worth a million of dollars, they could not sentence the convict to more than three years' confinement in the penitentiary? It is no argument to say, we only sentenced the convict on all three indictments, if such had really been the case, to but three years' confinement, and, therefore, the punishment does not exceed the maximum for one act of larceny. It is enough for my argument that they assumed the power to have adjudged the convict to fifteen years' confinement; but, in fact, in the case of
there was a fourth conviction under the Penitentiary Act, where the goods were found by the jury to be under five dollars' value, and for this the convict was sentenced to one month's confinement in the common jail, previous to his transportation to the penitentiary building to undergo his several terms of confinement, thus exceeding, by this last punishment of one month's confinement in the common jail, the maximum of the

punishment affixed, by the aforesaid act, to one act of larceny ; and thus, in my opinion, going counter to the humane intentions of Congress, when they passed the Penitentiary Act, and the obvious policy of the statute, the object of which was to apportion punishments to crimes, and establish a scale of punishments bearing a nearer relation to, and more commensurate with, the sense entertained by Congress of the grades of enormity of criminal offences, than was recognized by, or known to, the common law, whose sanguinary, arbitrary code, has been the subject of reproach and of animadversion by distinguished writers for a long period of time. Thus far, as to the opinion of the two judges being against the policy and spirit of the Penitentiary Act, I have said it was repugnant to common sense and common justice. As to the first, will any man of common sense say, that by the magic of some senseless, antiquated, technical conceit, an old rule which the human understanding revolts at as silly, irrational, and barbarous, and which, as it is against common right, I deem it in no wise irreverent to impeach, that you can change, as you would change a half eagle into five dollars, one crime into four or five, and thus enable this Court to invest themselves with an arbitrary and dangerous power of punishing transgressors to four or five times the extent allowed by law ; against not only the letter but the spirit of the law, and in direct contravention of its obvious policy, and the humane intentions of the legislature in enacting the law ? That you should have power to punish a citizen, merely because the goods belonged to different persons, with fifteen years' confinement in the penitentiary, where the value of all the goods stolen, taken together, amounted to about sixty or seventy dollars only ; nay, even twenty dollars ; and yet, if he stole to the value of a million of dollars, the property of one person only, you could not and dare not, inflict over three years' confinement on the convict ? Can common sense bear, for one moment, such a construction of the law as this ? Of a law, too, founded on and suggested by the very purpose of equalizing punishments with crimes. As to common justice, such a construction is so intuitively against it, that I should deem it a waste of words to attempt to approve or illustrate so self-evident a proposition. I have said, also, that this construction was against the third article of the Bill of Rights of Maryland, inasmuch as by adopting the common law they adopted that maxim, that "*Nemo debet bis puniri pro eodem delicto* ;" much less shall he be punished four or five times for the same offence. I have said, also, that it was against the Constitution of the United States, protecting the citizens from "cruel punishments ;" although the punishment of confinement in the penitentiary be not intrinsically and characteristically a cruel punishment,

yet I should deem it very cruel, if you multiply it on the offender to four or five times beyond what the law allows. To these great considerations of violence done to the safeguards provided for the citizens by the Constitution of the United States, the common law, the Bill of Rights of Maryland, the frustration of the humane policy of the penitentiary law, the utter confounding of common sense and common justice, often urged by me in support of my opinion against that of the two other judges, I have been met only with the old technical rule, that in spite of the letter and spirit of the Penitentiary Act, and all those great and weighty objections, the goods stolen, although taken at one time, belong to different persons, and for each person there is, by that old rule, a distinct larceny; as if an old rule, bearing absurdity upon its very face, must overawe and bear down the Constitution of the United States, the Bill of Rights of Maryland, the humane designs and policy of the Penitentiary Act, together with common sense and common justice; but if the foregoing considerations have no force in them, what reply can be made to this argument?

At the last Spring term in Alexandria, a woman (colored) named _____ was charged, in the same indictment, with stealing two articles belonging to two boys, as their separate property, namely, a coat belonging to one, and another garment from another scholar, at Holbrook's school, both together of the value of nine dollars. The Court adjudged the indictment to be good, and actually sentenced the woman to three years' confinement in the Penitentiary; thus establishing a precedent, that you may charge goods belonging to different persons in the same indictment, without rendering the indictment bad. If so, what justice or propriety is there in harassing the accused with multiplied indictments; or adopting one rule on one side of the river, another on the other, under the same law? Can it be said that both ways are right? This cannot be, because in one way the Court assume a power many times greater than in the other; or many times, *e converso*, less in one way than the other. But suppose, against all reason, as I think, that they have a discretion to sustain both modes of proceeding, can there be any question which one they ought to adopt, and which to reject? Is it not more congenial with the security of the liberty of the citizen, so carefully guarded by our Constitutions of the United States and of Maryland; with the known humanity of the law, which professes to repudiate vindictive punishments; with that good old maxim of the common law quoted before; with the known policy and humanity of the Penitentiary Act; with equal justice, to consider the larceny as but one offence, although the goods stolen belong to different persons, according to the Alexandria decision, than as distinct

offences, and so punish, under the same law, and for the same offence, one citizen four or five times more than another ; harass him with four or five indictments ; with paying counsel fees four or five times ; occupying the time of the Court, so overburdened with business, with four or five trials instead of one ; and multiplying the expense to the government four or five times, unnecessarily, and with no public advantage whatever ?

But when some of these arguments were urged by me to the other judges, against sustaining and tolerating these multiplied prosecutions for one and the same offence, as I really thought it to be, I was answered, that the traverser was indicted in five separate and distinct indictments ; that the Court could not judicially see that the said larcenies were committed at one time, or by one continuous operation pursuant to one preconceived intention to commit the said larcenies, or the said larceny.

To this, I replied, that from the evidence there was but one intention to commit larceny proved ; that in the indictments all the goods stolen were charged to be stolen on the same day, and the law allows of no fractions of a day, unless acts done are proved to have been done on different times on the same day ; that so far from this, all the goods stolen were, as far as the evidence went, taken at the same time, or by one continuous operation, and in execution of one preconceived intent to steal all the said goods ; if so, it was the duty of the Court to quash all the indictments except one ; that in the case of the *United States, v. ———*, alluded to above, there was the clearest proof that the accused stole the goods from the entry, not only at one time, but in very quick time, snatching up a parcel of hats, cloaks, &c., and making off, all under his arm with great speed.

Still the Court adjudged the transgression to amount technically to separate and distinct larcenies, and the party was convicted on all the indictments, and punished beyond what the law authorized for one act of larceny only. It is not enough to say, we cannot judicially take notice that the various larcenies charged in the several indictments were for goods stolen at one time, or by one continuous operation, and in pursuance of one preconceived intent, and therefore there was but one larceny committed ; I deem it my indispensable duty to hearken to the testimony to see that such is the case or not the case ; and if it be so to permit but one indictment to be prosecuted ; every consideration, as regards public justice, justice to the accused, justice to the suitors, justice to the judges themselves, and the unnecessary and useless waste of the public money, demands this duty at our hands.

I will now proceed to define or expound what I believe to be the true characteristics of a single larceny, and of several lar-

cenies committed by the same person ; a single larceny consists in stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a preconceived intention of stealing. Take, for example, the case of the traverser, Beerman, who stole sundry articles of clothing from Beerman's boarding-house, from several boarders living at the same house ; did he take the goods at one time, or by one continuous operation, in pursuance of a preconceived intention to take all the said goods ? if so, this, I say, is only one larceny ; or did he take part of the goods only at one time, with intent to take those goods only, and finding his theft successful, he, the next day conceived the intent to take, and did take, the residue, this would be a second and distinct larceny ; but according to the opinion of the Court in the case of the boy who robbed the entry which was clearly and manifestly done at one time, and quick time, too, the Court adjudged that there was a distinct larceny for every article of goods stolen, only because they belonged to different persons, establishing the principle, that where it was evident that the goods were all taken *uno flatu*, as the lawyers say, at one instant of time, yet that the larcenies are equal, in number, to the number of the owners of the goods.

In this case of Beerman, it may be urged against my argument, that Beerman knew, at the time he stole the goods, because he was an inmate in the house, that the goods stolen belonged to different persons, and therefore, in taking them with this knowledge, there was a distinct larceny for each owner of the goods, although the goods were all taken at one time, and pursuant to one intention ; but according to the opinion of the two other judges, this knowledge constitutes no part of the grounds of their opinion, inasmuch as in the case of the boy who stole goods from the entry, and of the colored woman in Alexandria, there was no evidence that the thieves knew, nor was there scarcely a possibility that they should have known, who were the owners of the goods, or that there were more than one owner ; thus establishing the principle, that if a thief, intending to steal from one person only, happens, unknowingly, to take goods belonging to several persons, that he is guilty of as many larcenies as there may be proprietors of the goods stolen : to this doctrine I can never assent, for the reasons given openly in Court, at the trial of the parties, and when the Court were passing sentence on the convicts, but which reasons I have expanded and reduced to more form in this written opinion, and which, to defend my own judgment better than I was able to do verbally and on the spur of the occasion, I have very reluctantly, against my wonted practice, set forth in writing, to be filed, if permitted, among the papers in the said indictments."

CRANCH, C. J., on the last day of the term, observed, that as Judge Thruston had thought proper to file his reasons for dissenting from the judgment of the Court in the case of the *United States v. Beerman*, the other judges would reserve the right to file also in vacation their reasons for that judgment; and on the 20th of August, the following opinion was filed by CRANCH, C. J., with the concurrence of MORSELL, J.

On the 30th of April, 1838, Judge Thruston filed a written opinion or protest against the sentences of the Court upon four of the five indictments against the prisoner for larceny.

1. Because it seemed to him that there was no evidence that the goods were taken from the five several owners thereof at several times, and not at the same time; and the indictments charge the goods to be all taken on the same day.

2. Because "*Nemo debet bis puniri pro eodem delicto.*"

3. Because the stealing goods, at one and the same time, belonging to different persons, is but one act of larceny.

4. Because the maximum punishment for one larceny, is three years' confinement and labor in the penitentiary.

5. Because this Court in Alexandria, decided, as he supposes, in the case of a woman who stole two articles, to wit, a coat from one scholar, and another garment from another scholar at Hallowell's school, and both charged in the same indictment, that it was but one offence; and that the indictment was good, and sentenced the woman to the penitentiary for three years.

6. Because, if all the goods stolen from different persons at the same time may be charged in one indictment; to harass the accused with more is oppressive and against the maxim above quoted, "*Nemo bis,*" &c., and against common justice and common sense.

"That the stealing of goods, at one and the same time, although the property of different persons, is but one act of larceny, and subjects the offender to but one punishment. To make it a distinct larceny for each owner of the stolen goods, is a mere technical rule, totally repugnant to the words and spirit of the penitentiary act, against common sense and common justice, and against the foregoing maxim of the common law, the Bill of Rights of Maryland, and the Constitution of the United States."

Again, the judge says: "If a thief contemplates stealing certain goods belonging to different persons, and carries his intent into execution at one and the same time, or, at least, by one continuous operation, it is but one offence, and subject to but one punishment."

Again he says: "If he stole from all of them, with one pre-conceived intent so to do, at one time, or by one continuous

operation, I say, notwithstanding the alleged technical rule above mentioned, it constituted but one larceny."

Again the judge says: "I will now proceed to define or expound what I believe to be the true characteristics of a single larceny, and of several larcenies committed by the same person. A single larceny consists in the stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a preconceived intention of stealing. Take, for example, the case of the traverser, Beerman, who stole sundry articles of clothing from Beerman's boarding-house, from several boarders living at the same house; did he take the goods at one time, or by one continuous operation, in pursuance of a preconceived intention, to take all the said goods? If so, this, I say, is only one larceny. Or did he take part of the goods only at one time, with intent to take those goods only, and finding his theft successful, he, the next day, conceived the intent to take, and did take, the residue; this would be a second and distinct larceny."

Again, the judge says: "From the evidence there was but one intention to commit larceny proved." "In the indictments, all the goods stolen were charged to be stolen on the same day, and the law allows of no fractions of a day, unless acts done are proved to have been done at different times on the same day. So far from this, all the goods stolen were, as far as the evidence went, taken at the same time, or by one continuous operation, and in execution of one preconceived intent to steal all the said goods. If so, it was the duty of the court to quash all the indictments except one."

These seem to be the substance of the arguments of the learned judge in his elaborate opinion.

By way of illustration, however, he has referred to two or three cases decided by this Court.

The first case, to which he alludes, is supposed to be that of Esther Gordon, at Alexandria. A woman was indicted for stealing from a closet in Hallowell's Academy, a coat and pantaloons belonging to two of the scholars; and she was charged, in one single count, with stealing both articles at the same time. Each article was of five dollars value or more, so that the stealing of either was a penitentiary offence.

It is said that the court sustained the indictment, and sentenced the woman to the penitentiary for three years, and thence it is inferred that the court decided that the stealing of the goods of the two scholars constituted but one offence.

The next case alluded to by the judge is supposed to be that of James McDowell, at March term, 1833, who was charged in four

indictments; first, for stealing a cloak and hat from F. X. Kennedy, of the value of ten dollars; second, for stealing a small cloak from Henry Hubbard, of the value of two dollars; third, for stealing a hat from W. Wentworth, of the value of six dollars; and, fourth, for stealing a hat from E. L. Childs, of the value of two dollars. The prisoner was convicted upon each indictment, and there having been no motion in arrest of judgment nor demurrer, nor motion to quash any of them, the Court (Judge Thruston, dissenting,) proceeded to pass the sentences required by law. Upon the first and third the sentence was two years' imprisonment and labor in the penitentiary in each case; and upon the second and fourth a small fine and simple imprisonment for one month in each case.

In these cases, the evidence is said to have been that the hats and cloaks were stolen out of the hall of F. X. Kennedy, who kept a boarding-house, and were probably all taken at the same time. I was not present at the trial, though I was at the time of passing the sentences.

The ground taken by the judge is, in substance, that the stealing of the goods of divers persons, at the same time, constitutes but one offence, and cannot in law be the subject of diverse indictments or prosecutions. This position, I think, cannot be maintained.

In *Hammond's case*, 2 Leach, 1089, cited in 2 Russell on Crimes, 102, Grose, J., says: "The true meaning of larceny is, the felonious taking the property of another, without his consent, and against his will, with intent to convert it to the use of the taker."

The gist of the offence is the violation done to the right of property of the injured individual, which it is the duty of the government to protect. The injury done to the right of property of A, is not an injury to the right of property of B. Both are injured, and each has an equal right to call upon the government to punish the offender. Stealing the goods of B, is as much an offence, as stealing the goods of A. A man may commit an assault and battery on two persons at the same time, yet the battery of one is not the battery of the other. If the offender should be indicted for the assault upon one of them, and be acquitted, he could not plead his acquittal in bar of an indictment for the assault upon the other. So if the man who stole the several goods of A and of B, should be indicted for stealing the goods of A, and should be acquitted, he could not plead his acquittal in bar of an indictment for stealing the goods of B, although stolen at the same time; because the evidence of stealing the goods of B, would not support the indictment for stealing the goods of A. So if a man, intending to murder A and B, should kill them both at one shot,

and should be acquitted upon an indictment for the murder of A, he could not plead that acquittal in bar of an indictment for the murder of B; nor, if convicted of the murder of B, could he plead it in bar of a prosecution for the murder of A.

By the common law, the owner of goods stolen, could not, upon conviction of the thief on a prosecution by indictment, obtain restitution of his goods; but was forced to bring an appeal of robbery, in order to have his goods again. 4 Bl. Com. 362, c. 27. But now, by the statute of 21 H. 8, c. 11, it is enacted that if the felon shall be convicted "by reason of the evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, then the party so robbed, or the owner, shall be restored to his said money, goods, and chattels." And the justices shall have power "to award from time to time, writs of restitution," &c., "in like manner as though any such felon were attainted at the suit of the party in appeal."

Dalton, in his Justice, c. 122, p. 346, says: "If a thief do rob or steal goods from three men, severally, and he be indicted for the robbing or stealing from one of them, and arraigned thereupon; in this case, though the other two would give evidence against the offender, yet shall they not have restitution of their goods, by the meaning of that statute," (21 H. 8, c. 11,) "for the felon is not attainted of any other felony saving that whereof he was indicted.

"But if he be indicted of all the three robberies or felonies severally, and arraigned upon one of them, and found guilty by the evidence given by one of the parties robbed, &c., yet shall he be after arraigned upon the other two indictments, to the intent he may also be guilty by the evidence of the other two persons robbed, and that so they may have restitution of their goods stolen, according to the meaning of the said statute.

"And if a man do steal goods at divers times from several men, and he is after attainted at the suit of one of them only for the goods stolen from him, but is not attainted at the suit of the others; by this attainder the felon shall forfeit to the king, not only his own goods, but also the goods stolen from those others at whose suit he was not attainted, though the felon had not the property, but only the possession of those goods. And the property of the goods which remaineth in the right owner in this case is forfeited (by the owner,) to the king, for default of the owner pursuing the felon."

Here it is evident, that Dalton first speaks of goods stolen from three several persons at one time, and considers them as distinct felonies, and liable to be severally prosecuted by indictment; and that if he be found guilty upon one of them, he may be after-

wards arraigned and convicted upon the others. He then speaks of goods stolen "at divers times from several men."

That the stealing of the goods of several persons at the same time, constitutes several distinct larcenies, appears to have been repeatedly adjudged in the English courts, and has, I believe, never been denied there, or in this country.

Thus in *William Turner's case*, Kelyng's Rep. 30: "One James Turner and William Turner, at Christmas sessions last," (1664,) "were indicted of burglary, for breaking the house of Mr. Tryon, in the night, and taking away great sums of money; and there-upon James Turner was found guilty and executed; but William Turner was then acquitted; and now there being great evidence that William Turner was in the same burglary with James Turner, and there being £47 of the money of one Hill, a servant to Mr. Tryon, stolen at the same time, which £47 was not in the former indictment, they would have indicted William Turner again, now, for burglary, for breaking the house of Tryon, and taking thence £47 of the money of Hill. But we all agreed that William Turner, being formerly indicted for burglary, in breaking the house of Mr. Tryon, and stealing his goods, and acquitted, he cannot now be indicted again for the same burglary, for breaking the house; but we all agreed that he might be indicted for felony, for stealing the money of Hill; for they are several felonies; and he was not indicted of the felony before. And so he was indicted. And I afterwards told my Lord Chief Justice Bridgeman what we had done, and he agreed the law to be so as we had directed."

The same doctrine is held in *Jones and Bever's case*, Kelyng's Rep. 52.

"At the jail-delivery in the Old Baily, 19 February, 1665, John Jones and Philip Bever were indicted for burglary, for breaking the king's house at Whitehall, and stealing from thence the goods of my Lord Cornbury, and were found not guilty; and afterwards were indicted for the same burglary and stealing the goods of Mr. Nunnesy; and we agreed that they, being once acquitted for the burglary, could not be again indicted for the same burglary, but might be indicted for stealing the goods of Mr. Nunnesy, according as was formerly resolved in *Turner's case*."

These cases, as far as they show that stealing the goods of A, and the goods of B, at the same time, constitutes two distinct felonies, are confirmed by the case of *Rex v. Vandercom & Abbott*, in 1796, 2 East, Cr. Law, 519, in which the Court overruled the opinion of the judges in the cases of *William Turner*, and *Jones and Bever*, so far as they had decided that the breaking and entering of the dwelling-house of Tryon, in the night, and stealing therein the goods of Tryon, and the money of Hill, constituted only one burglary.

In this case, (of Vandercom,) "The prisoners were indicted for burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, &c., with intent to steal their goods therein being; to which they pleaded *autrefois acquit* upon a former indictment charging the same facts, with this difference, that instead of the breaking, &c., being laid with intent to steal, &c., the indictment charged an actual stealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Susanna Gibbs; and concluding with an averment of the identity of the persons, and that the two indictments were for the same burglary.

"The case was argued upon demurrer before all the judges, and they unanimously held the plea bad; the grounds of which judgment were afterwards stated by Buller, J., at the old Baily in June, 1796.

"He began by observing that, on the part of the prisoners, it was contended that, as the dwelling-house mentioned in the two indictments, and the times, mentioned in each, when the offence was committed, were the same, therefore the offence was the same; and the acquittal on the former indictment a bar to the present. And further, that burglary was defined to be a felonious breaking and entering of a mansion-house in the night-time, to be completed by felony, or an intention to commit it; and that two cases in Kelyng were relied on in support of the plea of *autrefois acquit*."

After stating the two indictments, he proceeded: "The question is, whether the several offences described in the two indictments can be said to be the same?"

"That there was only one act of breaking the house, and a felony committed only at one time, must, on this record, be taken to be clear; but that does not decide the question. The crime of burglary is of two sorts. 1. Breaking and entering a dwelling-house, in the night-time, and stealing goods there. 2. Breaking and entering a dwelling-house, in the night-time, with intent to commit a felony, though that felony be not committed.

"The circumstance of breaking and entering the dwelling-house, is common and essential to both, but it does not, of itself, constitute the crime in either; for there must be a felony committed, or intended, without one of which the crime of burglary does not exist; and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night, and stealing goods there, evidence that he broke, &c., and intended to steal goods, or commit any other felony, would not support the indictment. In the case of the

present prisoners, the evidence applicable to the indictment now depending, which is for breaking, &c., with intent to steal, was not evidence to prove the first indictment for breaking, &c., and stealing goods. Then if the crimes are so distinct that evidence of one will not support the other, it is inconsistent with reason to say that they are so far the same that an acquittal of one shall be a bar to a prosecution for the other. Neither do legal authorities support such a proposition."

After stating *Turner's case* from Kelyng, the judge proceeded: "In that case the judges went on the idea that the breaking the house and the stealing the goods were distinct offences, and that breaking the house only constituted the burglary; which was a manifest mistake. The burglary consisted of breaking the house and stealing the goods; and if the stealing the goods of Hill were a distinct felony from that of stealing the goods of Tryon, (which they admitted it to be,) the burglaries, from necessity, could not be the same. In that case the fact was, that the prisoner broke the house of Tryon and stole the money both of Tryon and of Hill at the same time. He had been tried for breaking the house and stealing the money of Tryon, and might have been convicted if the prosecutor had used due diligence about his evidence, so that the prisoner's life had been put in jeopardy; but still the judges held that he might be tried for the other part of the same act, namely, stealing the money of Hill."

The judge then stated the case of Jones and Bever, from Kelyng, and said: "But authorities are not wanting to show the principle and foundation on which the plea of *autrefois acquit* is to be sustained." (He then referred to 2 Hawk. c. 35, § 3; Foster, 361, 362; and *Rex v. Pedley*, B. R. Tr. 1782.) These establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

"To apply that principle to the present case. The first indictment was for breaking and entering the house and stealing the goods. If it were proved, on that indictment, that the prisoners broke and entered the house, but had not stolen the goods, which are the facts contained in the present indictment, they could not have been convicted on that indictment by such evidence. They have not, then, been tried, nor were their lives ever in jeopardy, for this offence, which is for breaking the house with intent to steal the goods.

"For these reasons the judges are unanimously of opinion, that the plea is bad; that there must be judgment for the crown upon this demurrer, and that the prisoners must take their trial upon the indictment now depending."

From these cases it appears to have been the unanimous opinion of at least sixteen judges in England, that the stealing of the goods of two separate owners, at the same time, by the same person, and in the same place, constitutes two separate offences; and that this proposition, or doctrine, which does not appear to have been ever controverted, was so clear as to have been the admitted ground of the judgments of the courts, in these three cases of burglary; and Chitty, (vol. i., p. 457,) says: "And if two offences are supposed to have been committed at the same time, as if a horse and a saddle are stolen together, an acquittal of one will be no bar to an indictment for the other, for the crimes are essentially different."

This proposition, then, being established beyond all controversy, it follows that these separate offences may be the subject of separate indictments; and there are some reasons why it is not always "repugnant to common sense and common justice," that they should be, sometimes at least, thus prosecuted.

1. A count charging two distinct felonies would be liable to the objection of duplicity, and might be quashed, either upon motion before trial, or upon demurrer, or on motion in arrest of judgment; and even if charged in separate counts of the same indictment, although it would be no cause for demurrer, nor for arresting the judgment, because each count is to be considered as for a separate offence, and liable to a separate judgment; yet in England the practice of the judges is, if the objection is discovered before plea, to quash the indictment, and if not discovered until the trial, to put the prosecutor to his election for which offence he will proceed. (See Starkie's Cr. Plead. c. 2, § 2, p. 42; East's P. C. 515 to 522; *Young v. The King*, 3 T. R. 106; Leach, 531, 568; *Rex v. Jones*, 2 Camp. 132; Archbold's Cr. Plead. 54, 59, 60; *Rex v. Fuller*, 1 B. & P. 181; *Rex v. Galloway*, R. & M. 234; *Rex v. Flower*, 3 Car. & P. 413; *Rex v. Madden*, Moody, C. C. 277; *Commonwealth v. Symonds*, 2 Mass. Rep. 163, 164; 1 Chitty Cr. Law 168, 172, 248, 252 a; *Thomas's case*, 2 East's Cr. Law, 934; Co. Lit. 304 a; *Commonwealth v. Dove*, 2 Vir. Ca. 26.)

If an indictment charging several distinct offences, be thus liable to be quashed, the prosecutor ought not to be compelled to include them in one indictment, when there never has been a question that they may be indicted separately.

2. To charge the defendant with two distinct felonies in one count, or even in one indictment, may embarrass him as to his challenge of jurors. He might have good cause of challenge as to one of the offences, and not as to the other. If a juror should be found not indifferent as to the trial of one of the offences, and

indifferent as to the other, the United States might claim him as a competent juror as to this offence, while the prisoner might insist upon his being rejected as to the former; and if the juror should be rejected, it must be because the prosecuting attorney, by joining the two offences in one indictment, had subjected himself to this inconvenience. He ought not, therefore, to be compelled thus to join them.

3. If the prosecutor is obliged to charge, in one count, all the goods of divers persons stolen at the same time, he may be obliged, against his will, to charge the defendant with a penitentiary offence; for if charged in separate indictments, or even in separate counts, neither of them might be of sufficient value to send him to the penitentiary.

4. The prosecuting attorney may not know how the evidence may turn out, as to the time and manner of taking the goods. They may all have been found in the defendant's possession at the same time, but there may be no evidence that they were all taken at the same time. The Attorney of the United States would probably charge them as having been stolen on the same day; but the day laid in the indictment is immaterial, and need not be proved.

If he should not be able to prove that the goods were taken at the same time, then he might be put to elect, for the goods of which owner he would prosecute, and abandon the rest; and then one of the owners only would be entitled to restitution of his goods, for the defendant could be convicted of taking the goods of one only.

These are some of the inconveniences of charging separate offences in the same indictment, all of which may be avoided by charging them separately; and as the propriety and legality of joining them may, at least, be questionable, a prudent prosecutor would generally charge them in separate indictments.

It is true that Russell (vol. 2, p. 178,) says: "With respect to those larcenies which are aggravated by the amount of the property stolen, it should appear that the property, the value of which is taken into the computation, was all stolen at the same time."

"For, in fact, where things are stolen at different times, they are different acts of stealing, and no number of petit larcenies would amount to grand larceny, nor any number of grand larcenies, where it depended upon the value of the property stolen, to a capital offence. But it seems that if the property of several persons, lying together in one bundle, or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony."

And Hale, 1 H. P. C. c. 45, p. 530, says: "If two or more be indicted of stealing goods above the value of twelve pence, though in law the felonies are several, yet it is grand larceny in both. 8 E. 2, Coron. 404. But if upon the evidence it appears that A stole twelve pence at one time, and B twelve pence at another time, so that the acts were several, at several times, though they were the goods of the same person, this is petit larceny in each, and not grand larceny in either."

And again in p. 531, he says: "But it seems to me, that if, at the same time he steals goods of A, to the value of six pence; goods of B, to the value of six pence, and goods of C, to the value of six pence, being, perchance, in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties; and therefore if in one indictment, they make grand larceny."

It is remarkable, however, that neither Hawkins, nor his editors, have noticed this opinion of Lord Hale, although they have cited a preceding opinion which is now exploded, that goods stolen from the same person, at different times, if charged in one indictment, constitute grand larceny, although each parcel stolen at one time was under the value of twelve pence.

Again, Hale (2 H. P. C. 173,) says: "Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment."

This, no doubt, means in several counts, and that the joinder is no ground of demurrer, or of motion in arrest of judgment; and thus it agrees with the other authorities, and is cited, as law, by Chitty, vol. 1, p. 252 *a*; and Chitty vol. 3, p. 959 *a*, has copied from the Crown Circuit Companion, (which, however, is not remarkably accurate in its forms,) the form of an indictment charging, in one count, the stealing of the goods of two separate owners; and Mr. Starkie has transferred the same form to his appendix of precedents.

Mr. Chitty (vol. 3, p. 959 *a*.) in a note says: "Where several persons' goods are taken at the same time, so that the transaction is the same, the indictment may properly include the whole; but not so if the takings were at different times."

And Mr. Starkie, in a note to p. 440, note *d*, says: "Where the felonies are completely distinct, they ought not to be joined in the same indictment (see p. 44); but where the transaction is the same, as where the property of different persons is taken at the same time, there seems to be no objection to the joinder."

It seems, therefore, that whether they may or may not be pro-

United States v. Beerman.

perly joined in one indictment, depends upon the evidence which may be adduced at the trial ; and it is, therefore, impossible for the Court to know beforehand, whether they are or are not properly joined ; and the prosecuting attorney may be equally ignorant till the cause comes on to trial. The only safe course for him, therefore, in such case, is to charge the offences separately. There never has been a doubt suggested in any book or case which has come to my knowledge during the fifty years that I have been daily conversant with the law, whether they may not be separately indicted. The only doubt has been whether they may be joined.

In the case of Beerman, which has called forth the protest and opinion of our learned brother, there was no evidence to show that the goods were all taken from the several five lodgers, in the same house, at the same time, except that they were found in his possession at the same time. Some of the owners did not miss their goods till they were found in the prisoner's possession. One of the lodgers was sick, and I think kept his room. The prisoner was a lodger in the same house, and must probably have gone into the rooms of the other lodgers, at various successive times when they were absent, so that the probability is that the goods were not all taken at the same time and place. There was no suggestion at the trial, that the goods taken were found by the prisoner in one bundle, or on a table, or in a shop, according to the case put by Lord Hale. The District Attorney, therefore, in this case, would not, in the exercise of his discretion, have been justified by the principles of law, nor the practice of courts, and especially by the practice of this Court (which will be presently shown,) in joining these five offences in one indictment.

But, it is said, that "it was the duty of the Court to quash all the indictments except one."

I do not know by what law the Court had a right to quash good indictments, after conviction by verdict, without the consent of the Attorney for the United States. On the contrary, I apprehend it was the duty of the Court, upon the motion of the Attorney of the United States, to pronounce the judgment of the law upon each of these convictions.

If it was the duty of the Court to quash four of the five indictments, who had the right to select them ? And which of them shall be reserved for trial ? If the selection is to be made before trial and by the Court, it might be that the Court would select for trial the only one which could not be supported by the evidence ; and what would be the effect of quashing the indictments upon the future liability of the prisoner to a new prosecution ? Could it be pleaded as a former acquittal ?

Whether quashed before verdict, or after conviction, it would be equally unavailable as a defence to a subsequent prosecution, for no conviction is a bar unless followed by judgment. (See Starkie Cr. Pl. 364; 2 H. P. C. 251; 1 Chitty, 457, 462; 2 H. P. C. 248.) And no acquittal is a bar, unless it be "a legal acquittal by judgment, upon trial, by verdict of a petit jury." (1 Chitty, 457.) "There must be not only an acquittal by verdict, but a judgment thereupon *quod eat sine die*, for the bare verdict of his former acquittal is not a sufficient bar, without a judgment pleaded also." (2 H. P. C. 243, 246.)

The Court, after verdict, had no authority to quash any of these indictments, unless for some legal defect appearing in the record, or upon a motion in arrest of judgment; and the judgment should be arrested for some such cause before the Court would quash them; and then, perhaps, only upon the motion of the Attorney of the United States.

If the defendant had been acquitted, by verdict, upon these indictments, the Court could not, unless for some legal defect, have quashed the indictments, and thus deprived the defendant of the benefit of his acquittal; and for the same reason, now that the defendant has been convicted upon them, the Court cannot, unless for some such legal defect, quash them, and deprive the United States of the benefit of the conviction. Surely such a thing could not be done in a civil cause. If a plaintiff bring several suits upon distinct causes of action, which might have been joined in one declaration, and obtain a verdict in his favor in each suit, it cannot be pretended that the Court would have a right to quash all these declarations but one, and thus deprive the plaintiff of the benefit of his verdict, unless for some legal defect in the declarations or pleadings apparent upon the record or shown upon motion in arrest of judgment. Certainly this Court has never exercised any such power either in a civil or a criminal case.

I have examined every case of larceny in this county, of which any record remains, from the commencement of this Court in 1801 to the present time, and have found it to be the general practice of all the Attorneys of the United States to send up to the grand jury separate indictments for goods stolen from divers persons at the same time by the same person.

In the time of Mr. Mason and of Mr. Jones, a period of twenty years, there does not appear to be a single case where the thief is charged, in one indictment, with stealing the goods of divers persons at the same time, while there are, within the same period, eleven cases where goods stolen from divers owners, at the same time, are charged in as many indictments as there were owners of the stolen goods, namely, thirty-six indictments.

In Mr. Swann's time, a period of twelve years, there were only three cases, in which goods stolen from divers persons, at one time, by the same person, were charged in one indictment. These were in 1834 ; but there were, within the same period, thirty-six cases in which separate indictments were found for the stealing of the goods of divers persons, stolen at the same time, making ninety-one indictments in the thirty-six cases.

In Mr. Key's time, (a period of five years,) after Judge Thruston, in March term, 1833, (which was the first term after Mr. Key's appointment) had, in the case of *James McDowell*, publicly censured the practice of sending up separate indictments for stealing the goods of several persons at the same time, Mr. Key sent up indictments, charging in one count the stealing the goods of divers persons in seven cases ; namely, against Layland and Kurtz, severally at November term, 1835, for stealing two cloaks, one belonging to Mr. Martini, worth \$30, and the other to Miss Kane, worth \$7 ; against William Kurtz, at November term, 1836, for stealing ninety pieces of silver coin worth \$90, of W. R. King, and one handkerchief worth fifty cents, of F. K. Beck ; against Wm. Jones, at March term, 1837, for stealing a vest worth \$4.50, of George Mullen, and two boots worth \$3, of James Fitzgerald ; against Wm. Bell and Nicholas Golding severally, at the same term, who were each charged in two separate indictments for stealing the goods of sundry persons on the same day. In one of the indictments they were charged with stealing fifteen bank-notes of \$10 each, from Bernard Kelly, and in the other they were charged with stealing goods, worth more than five dollars, belonging to three several persons ; this case, therefore, exhibited the practice in both ways ; and against Esther Gordon, at Alexandria, in May term, 1836, for stealing a coat worth \$10, of D. W. Scott, and a pair of pantaloons worth \$5, of W. H. Metcalf.

In the mean time, however, that is, from March, 1833, to March, 1838 inclusive, Mr. Key had sent up separate and distinct indictments for goods stolen at the same time from separate and distinct owners, in twenty-three cases, making sixty-eight indictments.

Thus it appears that in the actual practice in this Court the proportion of separate indictments to joint indictments, for goods stolen at the same time, is one hundred and ninety-five to ten.

Until about the year 1833, when Mr. Key came into office as District Attorney, no objection to this practice had been suggested, it is believed, either here or in England. It had been left to the discretion of the prosecuting attorney to indict for the offences separately, or to join them in one count. In the few cases in which they have been thus joined it may have been doubtful in

the mind of the attorney whether he could prove the ownership of all the alleged owners, or it might be very expensive to procure the necessary testimony; or the goods stolen from some of the owners may have been of very trifling value, and therefore he may have thought it prudent not to put the United States to the expense of separate prosecutions; but whatever may have been the motive, the mode of proceeding has been left to the discretion of the District Attorney, who is an officer of the United States, and responsible for the proper discharge of the duties of his office.

If, then, it be clear, as I think it is, that the stealing of the goods of divers persons at the same time, constitutes several distinct felonies, *à fortiori* are they to be considered as several and distinct felonies, when the goods are taken at different times, although "taken under a preconceived intention of stealing them, and by a continuous operation."

Never having seen such a doctrine as this broached in any law-book which came within my notice, and no authority having been cited in support of it, I cannot believe it necessary to attempt to refute it.

In the opinion of the judge, it is intimated that in the case at Alexandria, where the goods of two of Mr. Hallowell's scholars were stolen at the same time (which was *Esther Gordon's case*;) this COURT settled the law that it was but one offence. But it does not appear that any question was made, either by motion to quash the indictment, or by demurrer, or by arrest of judgment; and the Court might have been of opinion that the two offences, committed at the same time, might be charged in one indictment. The sentence was for two years' imprisonment and labor in the penitentiary; not three years as supposed by the judge; this however makes no difference in principle. The defendant would have been liable to the same sentence if she had taken only the goods of either of the owners stated in the indictment.

Upon the whole, I am clearly of opinion that the stealing of the goods of divers persons at the same time, constitutes as many distinct offences as there are distinct owners of the goods stolen, and that they may be charged in as many separate and distinct indictments. That it is doubtful whether, if all should be charged in one count, the Court may not, before trial, quash the indictment, or upon the trial, compel the prosecutor to elect which of the offences he will prosecute; and therefore it is properly left to the discretion of the Attorney of the United States in which mode he will proceed.

I am also of opinion that if he prosecutes by separate indictments for each offence, and the defendant is found guilty in all, the Court cannot, without the consent of the United States' Attor-

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ney, quash any of the indictments; but on his motion, is bound to render judgment upon the verdicts according to law, unless there should appear upon the record, or upon motion, legal ground to arrest the judgments.

July 27, 1838.

W. CRANCH.

I concur in the foregoing opinion.

August 6, 1838.

JAMES S. MORSELL.

NEGRO HARRIET JOHNSON v. CORPORATION OF WASHINGTON.

The Corporation of Washington has power to prohibit the granting of tavern licenses to colored persons.

The justices of the peace have jurisdiction in cases against women.

APPEAL from the judgment of a justice of the peace who had rendered judgment against the appellant for a fine for keeping a tavern without license.

Mr. Dandridge, for the appellant, contended that the corporation had no right to discriminate between white persons and free colored persons, by prohibiting the granting of tavern licenses to the latter; and relied upon the opinion of this Court in *Carey's case*, at November term, 1835. He also contended that the charter did not give the corporation authority to restrain taverns, but only to license, regulate, and tax them.

Mr. Bradley, contra, relies on the same opinion to show that the corporation has authority thus to discriminate and restrain.

The COURT (MORSELL, J., not giving any opinion) was of opinion that the corporation has a discretion to prohibit the granting of tavern licenses to colored persons.

The COURT also (CRANCH, C. J., giving no opinion) decided that justices of the peace have jurisdiction in suits against women, in cases not exceeding fifty dollars in value.

AMELIA THOMAS v. OWEN SUMMERS.

A justice of the peace cannot issue an execution, as on a supersedeas, upon the mere indorsement on the back of the original judgment, that it was superseded.

APPEAL from the award of execution by a justice of the peace, upon a supposed supersedeas. The only evidence of a confession of judgment by way of supersedeas, according to the act of Assembly of Maryland, was an indorsement on the back of the original warrant, upon which the original judgment was entered, that it

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was superseded by Amelia Thomas, the appellant, and a similar entry on the justice's docket.

Mr. Hoban, for the plaintiff; *Mr. Redin*, for the defendant.

Reversed, (*nem. con.*)

THRUSTON, J., said, that if there had been evidence that diligent search had been made among the deceased justice's papers for the regular certificate of the confession of judgment, he should think the indorsement of the justice sufficient.

ERNESTUS GUTTSCHLICK v. BANK OF THE METROPOLIS.

The vendee of land, cannot, after paying the purchase-money, recover it back, upon the failure of the vendor to convey, unless the vendee has tendered to the vendor the form of a deed of conveyance to be executed by the vendor. But if the vendor has not a good title, at the time he is bound to convey, the vendee may recover back the purchase-money without tendering the form of a conveyance, as he is not bound to accept a defective title.

A written contract under the hands and seals of the president and cashier of a bank, purporting that the bank, through its president and cashier, is pledged, upon payment of the purchase-money, to convey to the purchaser, in fee-simple, a certain lot of land, in testimony whereof the said president and cashier, by order of the board of directors, have thereunto set their hands and seals, and signed and sealed accordingly, is admissible and competent evidence, in an action against the bank to recover back the purchase-money, without further evidence of the authority of the president and cashier to make the contract.

If the vendee receives an insufficient deed, as a compliance with the vendor's contract to convey, and afterwards discovers that the title of the vendor was defective, and that the deed conveys nothing, the vendee, in an action against the vendor to recover back the purchase-money, may give in evidence the said deed, with other evidence, showing the title to be defective, &c.

If the vendor's title be defective, the vendee may recover back the purchase-money, in an action of assumpsit, although he has been in possession of the premises several years.

ASSUMPSIT, to recover back the purchase-money from the defendants, for lot No. 5, in square No. 489, in Washington. The declaration had four counts:

1. That the plaintiff bought of the defendants the lot No. 5, in the square 489, in Washington, for \$1,191.25; in consideration whereof the defendants, through the president and cashier, agreed with the plaintiff that the defendants were pledged, when the purchase-money should be paid, to convey the lot to the plaintiff in fee-simple. That the plaintiff paid the purchase-money in full; but the defendants have not conveyed the lot to plaintiff, but refuse so to do.

2. That the defendants bargained and sold the lot to the plaintiff, and received the purchase-money, and in consideration thereof, put the plaintiff in possession of the lot, and agreed by their president and cashier, agents for that purpose duly authorized by the

defendants, to convey the lot to the plaintiff in fee-simple. That the plaintiff continued in possession from the 9th of November, 1827, to the 30th of December, 1835, when he was turned out of possession by the Patriotic Bank; and while in possession was obliged to pay taxes and other public dues thereon, amounting to three hundred dollars. Yet the defendants, although often requested, have not conveyed the lot to plaintiff in fee-simple, but refuse, &c.

3. That the defendants promised, upon receipt of the purchase-money, to convey the lot to the plaintiff in fee-simple, free of incumbrance. That the plaintiff paid the purchase-money, but the defendants were not seized in fee-simple of the lot, and although requested, did not and would not convey the same in fee-simple to the plaintiff; and that the plaintiff, being in possession, was obliged to pay taxes, &c., to the amount of three hundred dollars.

4. *Indebitatus assumpsit* for money had and received.

Upon the trial, on the general issue, the plaintiff gave in evidence the following paper:

"Be it known, that on this 9th day of November, 1827, Ernest Guttschlick hath purchased of the Bank of the Metropolis lot No. 5, in square No. 489, as above described, and as laid down in the plat of the city of Washington, for the sum of \$1,191.25, and that he hath paid, on account of the same, the sum of \$591.25, leaving due the sum of \$600, for which he hath given his note to the said bank, payable in six months after date, with interest from date, which sum of six hundred dollars, when paid, will be in full for the purchase-money of said lot.

"The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum shall be paid, to convey the said lot, namely, lot 5, in square 489, in fee-simple, to the said Ernest Guttschlick, his heirs or assigns forever.

"In testimony whereof, the said president and cashier, by order of the board of directors, have hereto set their hands and seals, this ninth day of November, eighteen hundred and twenty-seven.

"JOHN P. VAN NESS, [SEAL.] President of the Bank of Metropolis.

"ALEXANDER KERR, [SEAL.] Cashier.

"In presence of George Thomas."

And further proved that he had paid the note in the said agreement mentioned.

Whereupon *Mr. Cox*e, for the defendants, prayed the Court to instruct the jury, that upon the evidence aforesaid, the plaintiff was not entitled to recover upon the first count in the declaration.

*Mr. Cox*e contended that the plaintiff should have tendered a deed for the defendants to execute. Sug. Vend. 180, 296. If the vendor prepares the deed the vendee may not be satisfied.

The rule, therefore, has settled down that a purchaser cannot maintain an action against the vendor for not conveying, unless he has demanded a conveyance and tendered the form of a deed.

Mr. Bradley, contra, contended that the defendants were bound to tender a deed of conveyance. *Jones v. Gardner*, 10 Johns. 266; *Clute v. Robinson*, 2 Johns. 595.

The COURT (THRUSTON, J., *contra*,) gave the instruction as prayed by *Mr. Coxe*, being of opinion that the plaintiff could not recover upon the first count, as there was no evidence that he had demanded a conveyance, and tendered the form of a deed.

The defendants' counsel, *Mr. Coxe*, objected to the admissibility and competence of the paper aforesaid as evidence for the plaintiff, until some evidence should be given showing the authority of the president and cashier to sign the contract and to bind the bank, so as to take the case out of the statute of frauds.

But the COURT (CRANCH, C. J., *contra*,) overruled the objection, and permitted the contract to be read in evidence to the jury, without further proof except of the handwriting of *Mr. Van Ness* and *Mr. Kerr*, and of the payment of the money to the bank.

The plaintiff then offered evidence of an outstanding title in the Patriotic Bank, older than the defendants' title; namely, a deed of trust from B. G. Orr, under whom the defendants claim, to Joseph Elgar, to secure and indemnify one Samuel Lane, who had indorsed Orr's notes for \$6,000; a judgment against Lane's administrators; and a sale under the deed of trust, by Elgar to the Patriotic Bank.

Mr. Coxe, for the defendant, objected to evidence of the judgment against Lane's administrators, because there was no declaration filed in the cause, although one of the notes mentioned in the deed of trust was filed as the cause of action, and judgment confessed for that amount.

The COURT (*nem. con.*) overruled the objection and permitted the evidence to go to the jury.

The plaintiff then offered in evidence a letter from him to the defendants, stating that he had received a deed for the lot; and also offered to read the deed to the jury to show them that it was not a deed from the bank; but from the president of the bank under his private seal, and therefore conveyed nothing.

Mr. Coxe, for the defendants, objected to the reading of the deed to the jury in evidence, but the COURT (*nem. con.*) overruled the objection, and suffered the evidence to go to the jury.

Mr. Coxe, for the defendants, then prayed the Court to instruct the jury that upon the whole evidence the plaintiff was not entitled to recover.

He contended that the plaintiff having, in his letter of the 17th

of December, 1835, admitted that he had "received the deed accordingly," that is, according to the agreement, could not, in this action, deny its validity. The agreement was executed.

As to the second count; upon the eviction. There is no evidence of any lawful eviction by the Patriotic Bank.

THRUSTON and MORSELL, J., here stopped *Mr. Cox*e upon that point.

As to the third count; the defect of title. The agreement is only to convey in fee-simple, that is to convey in fee-simple all the right which the bank had. The agreement is not for a conveyance in fee-simple. The terms of the agreement cannot be extended at law; the plaintiff's remedy is in equity alone.

As to the fourth count. The plaintiff cannot recover on this count for money had and received, because the consideration has not entirely failed. The plaintiff has had the use and occupation for a period of seven or eight years.

Mr. Bradley, contra. The agreement is to convey the lot in fee-simple; this means a good title. The paper, which the plaintiff received, and which, in his letter, he calls a deed, is no deed from the bank, and would be good for nothing, even if the bank had had a title. It is under the private seal of the president of the bank only.

If the defendants had no good title the plaintiff was not bound to demand a conveyance, nor to tender a deed to be executed. The deed of trust to Elgar was outstanding, and all the debts secured thereby were unpaid.

The plaintiff's possession was no bar to the plaintiff's right to recover if the defendants can be placed in as good a condition as they were in before that possession. *Clute v. Robinson*, 2 Johns. 595; *Robb v. Montgomery*, 20 Johns. 15; *Greely v. Kevers*, 9 Johns. 126; *McCarthy v. Woolen Factory*, 14 Johns. 453; *Sugden*, 178, 179, 202, 206, 214, 243, 244, 283; *Hamilton v. Cutts*, 4 Mass. 349; *Conner v. Henderson*, 15 Mass. 319.

*Mr. Cox*e in reply. No case has been cited in which an action for money had and received, has been maintained, to recover back the purchase-money, after a deed had been given and received. The cases cited are all special actions upon all the circumstances of the case. A conveyance in fee of such title as the bank had, was a good compliance with the contract. The bank was not bound to give a title free from incumbrance. In the cases cited the contract was for a good title, or a good deed, or a good conveyance. A mortgage is no breach of the covenant of seizin. The entry of Dyson, the cashier of the Patriotic Bank, was no disseisin; the plaintiff still remained in possession. The lot was vacant and unimproved. 2 Saund. on Pleading, 613; *Keene v.*

 Fenwick v. Grimes.

Clark, 10 Peters, 291. The action for money had and received cannot be maintained for the purchase-money, unless the consideration has entirely failed. *Greenleaf v. Cook*, 2 Wheat. 13; *Caswell v. Black River*, 14 Johns. 457; *Conner v. Henderson*, 15 Mass. 319.

The COURT (MORSELL, J., *contra*,) refused to give the instruction prayed by *Mr. Coxe*, that the plaintiff could not recover upon the whole evidence.

MORSELL, J., thought that *Mr. Elgar's* trust was not an outstanding incumbrance, because twelve years had elapsed between the judgment against *Lane's* administrator in 1823, and the sale on the 21st of December, 1835, and therefore the plaintiff could not recover without tender of a deed to be executed by the bank.

THRUSTON, J., thought the plaintiff might recover upon the general equity and justice of the case.

CRANCH, C. J., thought the outstanding title in *Mr. Elgar*, at the time of the contract, and at the time of the payment of the purchase-money, dispensed with the obligation of the plaintiff to tender a deed to be executed, as he was not bound to accept a defective title.

Verdict for the plaintiff, \$1,191.25, with interest from the 9th of November, 1827. Bills of exception were taken by both parties.

Affirmed by the Supreme Court of the United States. 14 Peters, 19.

EDWARD FENWICK v. GUY GRIMES.

An action upon the case for deceit will not lie for a breach of promise.

If the owner of a female slave sell her for less than the market price upon the purchaser's representation that he wished to have her for his own use, and that she should not be removed out of the District of Columbia, nor sold to any person to be by him transported out of the district, and that she should live in the district, near her friends; and the purchaser afterwards sell her to a negro-trader living in the district, by means whereof the slave is removed out of the district; it is no justification of the defendant, in an action for the deceit, that after he had purchased the slave, he was persuaded by a friend, that she was unfit for his use, and that he ought to sell her; although the purchase was originally made by the defendant in good faith.

If the verdict be general, and one of the counts is bad, the judgment must be arrested; and the Court will not, after the verdict has been recorded, order it to be amended, by applying it to the good count only, unless the evidence given was applicable only to that count.

An action upon the case for deceit will not lie unless there was a false affirmation of some fact. A non-performance of promises is not sufficient. The declaration must charge that the defendant averred some fact to be true, and that it was false.

THIS was an action upon the case for deceit, by the purchaser of a female slave, by which the vendor was induced to sell her

for less than the market price. The declaration contained two counts.

1. The first count stated, that in conversation between the plaintiff and defendant concerning the purchase of the plaintiff's slave Henny, it was agreed between the plaintiff and defendant that she should not be removed out of this District of Columbia, nor sold to any person to be transported out of the said district, but that she should live, as a slave, in this district, so as to be near and convenient to her friends and acquaintances; and that the defendant, upon that conversation, falsely, fraudulently, and deceitfully affirmed to the plaintiff that the said slave should, after the defendant's purchase of her from the plaintiff, reside in this district during her lifetime; and the plaintiff, believing the affirmation to be true, sold her to the defendant for \$400, a price much less than the value of the slave if there had been no such understanding or agreement as to her residence; yet the defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff, sold and delivered the said slave to a negro-trader living in this district; by means of which said last sale and delivery the said slave has been removed out of this district to foreign parts, there to reside at a great distance from her friends and relatives; "and so the said plaintiff saith that the defendant him the plaintiff then and there falsely and fraudulently deceived and defrauded."

2. The second count stated, that on the 1st of June, 1833, the plaintiff was possessed of another valuable woman slave, named Henny, who had been brought up in the plaintiff's family and service, but for whose services he had no further use, and was willing to dispose of said woman slave for a sum far less than her real value to a master who resided, and who would keep her in the neighborhood, and would engage that she would not be sold away to the Southern negro-traders, and the defendant, well knowing the same, fraudulently came and represented that he desired her for his own private use, wanting such a slave to be kept and employed in the neighborhood aforesaid, and thereupon falsely, fraudulently, and deceitfully declared and protested that he would engage that the said slave should not be transported or sold away to traders in negroes, but should be kept and employed in this district; by reason of which false and deceitful representations, the plaintiff was imposed upon and prevailed with to sell to the defendant the said slave for the sum of \$400, a sum far less than her real value, which the plaintiff avers was at least \$600.

The plaintiff further avers, that he would not have sold the said slave but for the consideration of her being within this district,

for any sum of money whatever, and the defendant well knew the same ; and the plaintiff being so imposed upon as aforesaid, and relying upon the said representations, and promise, and engagement of the defendant, did sell and deliver to him the said woman slave. And the plaintiff further declares, that the said representations, declarations, and promises of the defendant, were utterly false and deceitful ; and that at the time he thus gave himself out, and imposed upon the plaintiff, as wishing to purchase the said woman slave upon the conditions and considerations aforesaid, for his own use and employment within the district, he had engaged to sell this woman slave to a negro-trader, a certain James Burch, who he well knew wanted to transport the said woman slave beyond the limits of this district ; and the defendant, having, as aforesaid, by fraud and deceit, bought the said woman slave intendedly for his own use, and possessed himself of the said woman slave, sold and delivered her to the said negro-trader, who took her and transported and carried her out of this district to foreign parts, unknown to the plaintiff ; and so the plaintiff saith, that by reason of the fraudulent, false, and deceitful representations as aforesaid, he was imposed upon to sell and dispose of the said woman slave for a much less sum than her real full value, and thereby lost the value of the said slave ; and was otherwise greatly injured by the said several promises, and hath damage to the sum of \$1,000.

Upon the trial, *Mr. Key*, for the defendant, moved the Court to instruct the jury, "that if they should believe from the evidence, that the defendant bought the woman for his own use, and intending *bonâ fide* to keep her according to the said agreement ; and was afterwards persuaded by his friend that she was unfit for his use, and that he ought to sell her as aforesaid, and that he did, on such persuasion, sell her, then there was no deceit, and then the plaintiff is not entitled to recover."

But the COURT (MORSELL, J., not giving an opinion, having been absent at the commencement of the argument,) refused to give the instruction.

Verdict for the plaintiff, \$115.53.

Mr. Key moved in arrest of judgment, contending that the first count was bad for want of a *scienter* ; that is, an averment that the defendant knew that the person to whom he sold the slave, was a negro-trader.

In the case of *Price v. Read*, 2 Har. & Gill, 291, which has been cited by the opposite counsel as the precedent for the present case, the sale was averred to have been made to a negro-buyer, living out of Maryland, and in one of the Southern States.

Mr. R. J. Brent, contrâ. The declaration is drawn from that

in *Price v. Read*. The averment is, that the defendant sold her to a negro-trader. The inference is, that she was to be taken out of the district. *Adams v. Anderson*, 4 Har. & John. 558.

This objection comes too late after verdict. The jury could not have found the verdict for the plaintiff, unless it had been proved that the defendant knew he was a negro-trader; or that the sale was with the intent that she should be removed out of the district. At most, the ground of action is defectively stated, which is cured by verdict. *Rushton v. Aspinall*, Doug. 681, 683.

Mr. Key, in reply. The ground of action is not defectively set out; but the first count states no cause of action.

CRANCH, C. J. In the case of *Price v. Read*, (2 Har. & G. 291,) from which this declaration was drawn, there was no question made as to the validity of the counts in that declaration; nor did the counsel for the defendant argue the case before the court of appeals; and therefore the case is of little weight upon that question.

The substance of the first count is, that the plaintiff was induced to sell the slave for less than her value, by the defendant's agreement that she should not be removed from the District of Columbia; yet the defendant sold her to a negro-trader, living in the district, by means whereof she has been removed from this district; and so the defendant deceived and defrauded the plaintiff.

Here is no false affirmation of a fact, but, at most, only a breach of promise. No deceit is averred previous to the sale by the defendant; and the deceit, if any, was subsequent to the sale, and consisted only in a disregard of the agreement; and was only that kind of deceit which every debtor practices when he refuses to pay his debt according to his promise.

Even if it had been an action of assumpsit, instead of deceit, there is no cause of action alleged. The promise was, that she should not be removed from the district; the breach is, that the defendant sold her to a negro-trader living in the district, by means of which sale she was removed; but it is not averred that this last sale was made by the defendant with intent that the slave should be removed, or that the defendant caused the removal. There was no engagement on the part of the defendant that he would not sell the slave within the district, nor to a negro-trader.

This count may be true, and yet the defendant may have taken an obligation from his vendee that the slave should not be removed. I think the count is bad, and that, as the verdict is general, the judgment must be arrested.

THRUSTON, J., absent. MORSELL, J., concurred.

Mr. Brent then moved to amend the verdict so as to make it applicable to the second count only; and cited *Bernard v. Whit-*

ing, 7 Mass. Rep. 358; 2 Tidd, 770; *Williams v. Breedon*, 1 B. & P. 329.

Mr. Key, contra. In the case of *Williams v. Breedon*, (1 B. & P. 329,) there was a certificate of the judge that the jury gave their verdict for damages upon evidence applicable only to the good count; and therefore the Court had a right to alter the verdict, which was general, so as to apply it only to the good count, and to enter a verdict for the defendant upon the other count. But in the present case there was no such certificate, nor any other means of knowing on which count the jury found their verdict; and in the same case of *Williams v. Breedon*, the Court said that as there was evidence applicable to both counts, if there had been no other evidence to show on what ground the damages were given by the jury, it would not be competent for the Court to alter the verdict. *Stephenson v. Hayden*, 2 Mass. Rep. 406; *Barnes v. Hurd*, 11 Id. 57, 58; *Sheely v. Biggs*, 2 Har. & John. 364.

But the second count is as bad as the first. There is no *scienter* that the defendant sold the slave with intent that she should be carried out of the district.

CRANCH, C. J. The only misrepresentation of fact, stated in this second count, is, that the defendant represented that he "desired" the slave "for his own use;" but that representation is not averred to be false; it is not averred that the defendant did not desire the slave for his own use.

The other supposed misrepresentations are only breaches of promise or contract, for the performance of which, the plaintiff relied upon the credit of the defendant.

It is true, that the plaintiff "declares that the said representation, declarations, and promises, were utterly false and deceitful," and that "at the time the defendant gave himself out as wishing to purchase the slave upon the conditions," &c., "and for his own use," &c., he had engaged to sell the slave to a negro-trader who he knew wanted to transport her, &c.; but this is no direct denial that the defendant "desired the slave for his own use."

If this count is to be considered a count for money obtained by false pretences, the pretence should have been distinctly averred, and its truth denied in terms.

The mere non-performance of a promise is not such a deceit as will support an action of deceit. The remedy is an action of *assumpsit*, to which the general issue is not, not guilty, but *non assumpsit*.

I am, therefore, of opinion, that the second count as well as the first is bad, and that judgment must be arrested upon both.

The other judges concurred.

 Griffin v. Jeffers.

Judgment arrested upon both counts.

Mr. Brent then moved for leave to amend the declaration, and for a *venire de novo*; and cited the case of *Golding v. Good*, in this Court, at December term, 1821, (not reported,) and *Semmes v. Sherburne*, at December term, 1825, (2 Cranch, C. C. 446,) in which case it is said judgment was arrested for a fault in the declaration, and the Court gave leave to amend on payment of the costs of the term; but I have no note of the point, and no note of the case of *Golding v. Good*. *Cur. ad. vult.*

The COURT, (*nem. con.*) at November term, 1838; refused leave to amend.

SYLVESTER WELCH v. JOHN HOOVER.

An agent is a competent witness to prove his own authority, if not in writing; and is not incompetent by reason of his liability to either of the parties.
A parol authority will support a written contract.

ASSUMPSIT, for feeding cattle, &c.

Mr. Brent, for the plaintiff, offered to examine *Mr. Owens*, as a witness to prove that he, as agent of the defendant, contracted to purchase of the plaintiff seventy-four head of cattle; \$500 to be paid in cash, and the residue by the 1st of November, when the defendant was to take the cattle away.

Mr. Bradley, for the defendant, objected to the testimony of *Mr. Owens*, until his agency should be proved; and that he was not competent to prove his own agency; and that, if proved, he was not competent, because interested.

The COURT, however, (THRUSTON, J., doubting,) permitted the witness to be examined without a release from either party; and decided that he was competent to prove his own authority, if it was not in writing. See *Starkie on Evidence*, Part 4, p. 55.

Mr. Bradley then objected, that a parol authority will not support a written contract made by the agent.

But the COURT (MORSELL, J., absent,) overruled the objection.

Verdict for plaintiff, \$472.32.

PETER GRIFFIN v. MATTHIAS JEFFERS.

If the defendant reads a part of the plaintiff's account, filed with the declaration, in evidence to the jury, he thereby makes the whole account evidence for the plaintiff.

INDEBITATUS ASSUMPSIT, "for sundry matter and articles pro-

perly chargeable in account, as by a particular account thereof herewith into Court exhibited appears," amounting to \$97.93.

Upon the trial, at March term, 1836, *Mr. Z. C. Lee*, for the defendant, in order to prove certain dates, read in evidence to the jury a part of the plaintiff's account, which had been filed with the declaration.

Mr. Coxe, for the plaintiff, contended, and prayed the Court to instruct the jury, that the defendant's counsel, by reading a part of the account to the jury as evidence, had made the whole account evidence for the plaintiff.

And the COURT (THRUSTON, J., absent,) gave the instruction as prayed.

Verdict for the plaintiff, \$97.93.

Mr. Lee moved for a new trial on the ground of misdirection of the jury, and cited the case of *Gracy v. Bailee*, 16 Sergeant & R. 126, abridged in 1 Wheeler, 170.

But the COURT overruled the motion.

Judgment for plaintiff.

See *Harrison v. Rowan*, 3 Wash. C. C. R. 580; *Blight v. Ashley*, 1 Peters, C. C. Rep. 15; *Beall v. Davis*, in this Court, at December term, 1826; *Coote & Jones v. Bank of the United States*, in this Court, at the same term (3 Cranch, C. C. 50); and *Smith & Son v. Coleman et al.* in this Court, at Washington, April term, 1821, (2 Cranch, C. C. 237.)

RICHARD C. L. MONCURE and WALTER P. CONWAY, Executors of
MARY JAMES v. ANNE R. DERMOTT.

A covenant, absolutely to pay a usurious debt directly to the lender, is not a covenant simply to indemnify the surety, although delivered to the surety, but is a security for the usurious debt to the lender, especially if the instrument, upon its face, does not purport to be a covenant to the surety, but an undertaking to pay the debt directly to the lender of the money.

A covenant to pay an usurious debt to the creditor is void, under the statute of Virginia, although delivered to the surety, who was ignorant of the usury; it being a security for the usurious debt, and the surety who innocently pays the debt, cannot, upon that instrument, recover from the debtor the money thus paid.

An assignor of a bond is not estopped to deny its validity in law.

Although the affirmative of the issue be upon the defendant in an action of covenant, yet as the plaintiffs must prove damages sustained by the breach of the covenant, they have the right to open and close the argument before the jury.

If the cause of action be usurious, no waiver of the objection by the defendant, *in pais*, will avail the plaintiff.

If a man in Virginia, *bonâ fide* buy a bond at such a discount that the lawful interest upon the bond will produce him 12 per cent. per annum upon the purchase-money, it is not usury; but if he intended it only as a cloak under which to evade the statute, it is usury.

Moncure and Conway v. Dermott.

If there be no loan of money secured by the bond, and it be purchased *bonâ fide*, the transaction is not usurious, although purchased at such a discount as enables the purchaser to obtain an interest of 12 per cent. per annum upon the purchase-money, and although the bond was made to raise money upon, if the purchaser was ignorant of that fact.

If the instrument upon which the suit is brought, be a security for the usurious debt, it is void by the statute, and the plaintiffs cannot recover upon it the money which they, as executors of the surety, paid in satisfaction of such usurious debt; although, when they paid it, they were ignorant of the usury; and it was not necessary that the defendant should have informed them of the usury, and instructed them not to pay it, before they paid it.

What facts may be inferred from other facts, is a question of law.

And from certain facts the jury may infer, that a certain transaction is substantially a loan, although it may appear to have been made in the form and name of a sale of a bond.

This was an action of covenant, upon the following instrument:

"Whereas Mary James has executed her bond or note, dated the 28th day of November, 1828, payable to me, on demand, for the sum of \$2,620, which said bond or note was merely loaned to me for the purpose of raising money upon; and whereas I have, since the execution of the said bond or note, as aforesaid, assigned it to Philip Alexander, of Fredericksburg, for value received of him. I do, therefore, hereby bind myself, my heirs, executors, and administrators, to pay and discharge the said bond or note, with all interest that may accrue thereon, when the same shall become due and payable. Given under my hand and seal this 12th day of August, 1829. ANNE R. DERMOTT. [L. s.]"

The "bond or note" mentioned in the above instrument was as follows:

"\$2,620. On demand I bind myself, my heirs, executors, and administrators, to pay to Anne R. Dermott, her executors, administrators, or assigns, the sum of two thousand six hundred and twenty dollars, for value received, with interest from the date hereof. Given under my hand and seal this 28th day of November, 1828.

MARY JAMES. [SEAL.]"

Upon which was the following indorsement: "I assign the within to Philip Alexander for value received this 1st day of December, 1828.

ANNE R. DERMOTT."

It appeared in evidence that the following payments on account of this "note or bond" were made by Miss Dermott (the defendant) namely, 19th April, 1831, \$180. December 27th, 1831, \$200. February 7th, 1832, \$225, and on May 8th, 1832, \$395. And the following payments were made by the plaintiffs, namely, December 6th, 1833, \$600. December 28th, 1833, \$1,346.52; and December 31st, 1833, \$435.55 in full.

That this "bond or note" was made to raise money upon to pay a debt due by the defendant to Thomas Poultney & Son of Baltimore, upon the following obligation; namely,

Moncure and Conway v. Dermott.

"We, Mary James, Anne R. Dermott, William C. Beale, and John Moncure, of the county of Stafford, and Thomas Sedden of the town of Fredericksburg, do hereby promise and bind ourselves, our heirs, executors, and administrators jointly and severally, to pay to Thomas Poultney & Son of Baltimore, their executors, administrators, or assigns, the just and full sum of three thousand six hundred and thirty-three dollars and sixty-one cents on or before the 23d day of November, 1828, as witness our hands and seals this 31st day of March, 1826.

Attest: J. M. Conway; as	}	MARY JAMES.	[SEAL.]
to Mary James and Anne		ANNE R. DERMOTT.	[SEAL.]
R. Dermott.		WM. C. BEALE.	[SEAL.]
		JOHN MONCURE.	[SEAL.]
		THOMAS SEDDEN.	[SEAL.]

On that instrument was the following indorsement:

"Paid by T. Sedden, on account of Robert James,	\$629.20
"Check on United States Bank at Washington,	628.33
"Paid by P. Alexander,	2,340.00

\$3,597.53

"Balance due T. Sedden, for which he has a note of J. Moncure's,	36.09
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\$3,633.62

"Thomas Poultney & Son, pay Thomas Sedden, Esq., cash.
or order. EVAN POULTNEY."

That on the same 31st of March, 1826, the said Mary James, (of the county of Stafford,) conveyed in trust to Arthur A. Morson, to secure and indemnify the three sureties Beale, Moncure, and Sedden, against their liability upon that note, about five hundred acres of land and thirteen slaves, in Stafford county, with power to sell the same if the debt should not be paid by Miss James or Miss Dermott.

That as early as March 14th, 1828, Mr. John Moncure, in behalf of Miss Dermott, applied to Mr. Philip Alexander, of Fredericksburg, to obtain from him money to pay off this debt to Poultney & Son, and that Mr. Alexander finally determined that he would give \$2,200 for a bond to be given by Miss James, payable in five years, for \$3,400; but he would require a deed of trust from her (Miss James) of her land and slaves; and that the balance which would be due to Poultney & Son over and above the \$2,200 to be placed in his (Alexander's) hands so that he might pay the debt to Poultney & Son and get a release of the deed of trust already given to Mr. Morson to secure the sureties Beale, Moncure, and Sedden, and take a new deed of trust for his security.

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That Miss James was the defendant's aunt, and the defendant either lived with her, or near her, at the time the negotiation was going on with Mr. Alexander about raising the money, and was in habits of intimacy with her.

That Miss James and Mr. Alexander were well acquainted with each other. That the money to be raised was solely to pay off the debt to Poultney & Son, for which Miss James was bound as principal, and had given a deed of trust upon her land and slaves.

That on the 8th of December, 1828, the said Mary James conveyed her land and slaves to John Moncure in trust to secure to Mr. Alexander the payment of her bond on the 1st of December, 1830.

That on the 24th of November, 1828, (four days before the date of Miss James's bond) Mr. Alexander, in a letter to Mr. John Moncure, who was conducting the negotiation on the part of the defendant, says, "and as the profit on the transaction in which I am about to engage will be small, I will have nothing to do with it unless every thing is clear and perfectly indisputable." He then makes particular inquiry as to Miss James's title to the land and slaves; and says, "it is absolutely necessary that I should have all this information before I engage in the transaction. There is now but little time left to obtain it; perhaps too little. If I pay the \$2,350 on Wednesday, it must be with the distinct understanding that, if the business be not arranged to my entire satisfaction, that Mr. Sedden, Mr. Beale, and yourself refund me the money I pay; which will leave you all precisely in the situation you would be placed if I had nothing to do with the business." "I cannot pay the money on Wednesday, without having a distinct understanding with Mr. S., Mr. B., and yourself as to the repayment of the money I pay in case the business shall not be arranged to my satisfaction." And in the postscript he says, "you entirely misunderstood my views, if you supposed I was willing to purchase paper to produce me twelve per cent. on the money paid at the end of five years. My view was that it should, upon the money advanced, produce me annually twelve per cent. You will find, upon a calculation, that the sum I advanced, by compounding the interest at the end of each year, will not produce to me more than about eight per cent. Now it can hardly be expected that I would advance money and wait five years upon a security somewhat doubtful, and at last to receive only eight per cent., or a little over common bank interest paid each sixty days and compounded. I am willing to enter into the transaction if I can realize what were my views, twelve per cent. upon the money annually." The defendant also produced in

evidence a letter dated November 25th, 1828, from Miss James to Mr. P. Alexander, in which she says, "my niece Miss Anne R. Dermott informs me she contemplates selling and assigning to you my bond for \$2,880, dated the 22d of this month, and payable on demand. I am anxious to obtain time for the payment of the same; and propose, should you take the assignment to place the debt upon a footing of perfect safety if you will grant the time I wish, say five years from the date of the bond, by conveying to a trustee of your own selection, land and slaves amply sufficient to secure both the principal and interest of the debt to be paid at the expiration of the five years from the date of the note. If you take an assignment of the note and accede to my proposition, I hereby bind myself, my heirs, executors and administrators, to execute a deed of trust when tendered to me, on the following property; namely, all my lands in the county of Stafford and my slaves," (naming them.) "The property is at present under a lien to secure Mr. Moncure, Mr. Beale, and Mr. Sedden as my securities to Mr. Poultney of Baltimore; but these gentlemen will release the property, or, if they think proper, give you the benefit of the lien."

And the following letter from Mr. Alexander to Miss James, dated, "*Fredericksburg*, 28th November, 1828.

"Dear Madam — I received your letter this morning, and am willing to take the bond, provided you will agree to pay me five hundred dollars annually, and the balance at the expiration of the five years, and upon the debts being made perfectly secure.

Yours respectfully, P. ALEXANDER."

It appeared in evidence that the negotiation for the money had been going on from the 14th of March to the 28th of November, between Mr. Alexander and Mr. John Moncure, as the friend and agent of Miss Dermott.

That in every application of Mr. Moncure to Mr. Alexander to advance money, he avoided saying any thing to him in relation to the note or bond of Miss James being executed for the purpose of raising money upon it for the defendant, because he believed that if he did, Mr. A. would have declined making any arrangement whatever to advance the money required by the defendant. But in every application made to Mr. A. by Mr. M. on the occasion, he called on Mr. A. to know what he would give for Miss James's note to the defendant for a certain sum.

That the objection to letting Mr. Alexander know that the bond sold to him was a loan to the defendant, was this: he (Mr. M.) believed, from his knowledge of Mr. A. and of his business transactions, that if he informed him that the note or bond was a

loan, he would have declined making the advance for it which he did.

That the bond of Miss James to the defendant, was made to raise money upon to pay off the debt to Poultney & Son, for which Miss James, and her lands and slaves, were bound ; and was a loan to the defendant for that purpose, and was made to suit Mr. Alexander's views, and in pursuance of the agreement made with him by the defendant through her friend Mr. Moncure.

There was also evidence tending to show that Miss James knew the purpose for which the bond was given, and the nature of the transaction with Mr. Alexander by which the money was raised.

There was no evidence that the defendant informed the plaintiffs of it, or warned them not to pay the money ; nor that they gave notice to the defendant that they were about to pay it.

That from the defendant's several payments on account of the bond, and her silence, the plaintiffs were justified in supposing that she had no objection to their paying it in full.

Mr. Jones and *Mr. Swann*, for the defendants contended that the transaction with Mr. Alexander was usurious, and that the covenant of the defendant to pay that usurious debt directly to Mr. Alexander, was a security for the debt, and was void under the statute of Virginia, which enacts that all "covenants" "for the payment of money lent, on which a higher interest is reserved or taken than is allowed" by the statute, "shall be utterly void." It is not a covenant to indemnify Miss James ; but a covenant to pay the debt due upon Miss James's bond, assigned by the defendant to Mr. Alexander. The pretence of its being a sale of the bond, is a mere cloak for the usury. Mr. Alexander insisted upon having twelve per cent. per annum for his money, and prescribed the security which should be given, namely, Miss James's bond and deed of trust. The bargain was made before the bond was drawn and executed ; and the bond was made to conform to Mr. Alexander's "views."

Mr. Key and *Mr. Dunlop*, *contrà*, contended that the covenant was in legal effect a covenant of indemnity only. Although Miss James is not named as a party to the covenant, and nothing is said about indemnifying her, yet, as it was delivered to her, and as the payment of the money to Mr. Alexander would in effect be equivalent to indemnification, the legal construction of the instrument is that it is a contract of indemnity. Miss James was an innocent surety. There is no evidence she knew of the usury when she gave her bond.

The statute of usury does not reach an indemnifying bond.

Carter v. Cutting, 5 Munroe, 237, 238, 239; *Rice v. Mather*, 3 Wend. 62; *Robinson v. May*, Cro. El. 588; *Button v. Downham*, Id. 642; S. C., Noy, 73; *Ford v. Keith*, 1 Mass. Rep. 138.

But the debt to Alexander was not usurious. He had a legal right to purchase the bond at any discount. *Hansborough v. Bailor*, 2 Munroe, 36; *Taylor v. Bruce*, Gilmore, 42; *Whitworth v. Adams*, 5 Randolph, 377; *Parker v. Rochester*, 4 Johns. Ch. Rep. 329.

The defendant is estopped to deny the validity of Miss James's bond. *Rainsford v. Smith*, Dyer, 196 a, pl. 41; 5 Wheeler, 106; 8 Cowen, 102; *Miller v. Stewart*, 9 Wheat. 702-704; *De Wolf v. Johns*, 10 Wheat. 367.

Mr. Jones and *Mr. Swann*, in reply. Miss James was bound in the sealed note to Poultney & Son, and made her bond to raise money upon to pay that note. She was an original party to the usury, and the money was raised for her benefit, as well as for that of the defendant. She had given her obligation to indemnify three of the five obligors in that sealed note, all of whom were jointly and severally bound to Poultney & Son. In that note Miss James signs as principal, and in her obligation to indemnify the three sureties she calls it her debt, and makes herself the principal debtor.

The defendant bound herself absolutely to pay the usurious debt directly to Alexander. In the cases cited from Cro. El. the contract was to indemnify the surety from suits on account of the usurious bond; and the reason given for the judgment in those cases is, "for that the surety, by intendment, cannot know of the corrupt contract, to plead it in avoidance of the bond; wherefore the principal ought to take care thereof." But in the present case Miss James had knowledge of the usury. The money was raised as much for her use as for that of the defendant. The covenant of the defendant is not to indemnify, but to pay the original debt. The cases of indemnity, therefore, do not apply.

In the case of *Dowman v. Butter*, Noy, 173, which was "on a counter bond to save harmless" Walmesley said, "the plaintiff shall recover. For that counter bond was made *bonâ fide*, and perhaps the surety was not conusant of the usurious contract, and then, he cannot, nor ought to plead that; as if error had been in the first suit; yet the surety shall recover upon the counter bond, although that he takes no advantage of the error. So if the surety had been an infant, and had not pleaded nonage. And that counter bonds mentioned in the Stat. 13 Eliz. are intended for payment of money to him that lent the money; and not between him that borrows and the surety." "Note, the saving harmless is the substance of the counter bond."

The covenant of the defendant to pay the debt to Mr. Alexander was an additional security to him for the usurious debt. The defendant, if liable at all, was liable, although Miss James or her executors had never paid a cent of the debt, and they might have recovered of her the whole amount for the benefit of Mr. Alexander. Miss James might have avoided her own bond by the plea of usury, and yet recovered the whole debt from the defendant.

If the plaintiffs knew that it was a debt due by the defendant, they were bound to inquire of her whether it was due, or whether she had any defence; and if they paid it without such inquiry, they paid it in their own wrong, and are now lending themselves to Mr. Alexander to enable him to recover of the defendant a debt which they could not recover from Miss James.

In the present case the breach of covenant assigned is, that the defendant did not pay the debt to Mr. Alexander; not that she did not indemnify Miss James. A bond to indemnify against an usurious contract may be good, but a bond to pay the usurious debt is void, whether the obligor knew that it was usurious or not. In the case from Mass. Rep. the plaintiff had no knowledge of the usury when he indorsed the note, and the notice given to him afterwards and before he paid the money, was only a notice that there was usury, but not of the particulars, so as to enable him to plead the usury and maintain his plea; and there was no instruction not to pay it. But here all the parties were concerned in the usurious contract, with full notice of all the circumstances.

In *Carter v. Cutting*, Mr. Lee, the executor, was not warned not to pay the debt; he paid it; but the Court refused to allow the payment in his administration account, and he had to repay it to the heirs of Carter. Ord on Usury, 123, 125; *Popkins's case*, 3 Leonard, 63; *Dowman v. Butler*, Noy, 173.

The defendant is not estopped to deny the legal validity of the bond, or any other matter of law.

On the trial, the counsel for the plaintiffs, prayed the Court to instruct the jury, "That it is not competent for the defendant in this action to deny, by plea or otherwise, the validity of the note of 28th November, 1828, recited in the covenant on which this suit is brought; and that she is estopped from setting up, in this action, any alleged usury, as affecting the validity of said note."

Which instruction, the COURT (THRUSTON, J., absent,) refused to give.

The counsel of the plaintiffs then prayed the Court to instruct the jury, "That the plaintiffs are entitled to recover in this action, the sums which the jury are satisfied, from the evidence, were paid by the plaintiffs to Philip Alexander, on the bond dated 28th

November, 1828, unless the defendant proves to the jury that before such payments, the plaintiffs were notified that the bond of 28th November, 1828, was tainted with usury, and instructed to dispute the same."

Which instruction, the COURT also refused; principally because they were of opinion, that the contract of the defendant was not a contract for indemnity, but an absolute obligation to pay the bond assigned to Philip Alexander; and that if that bond was usurious, this bond of the defendant to pay it was also usurious and void. See Story's Conflict of Laws, 206.

The plaintiff's counsel then prayed the Court to instruct the jury, "That if they should believe, from the evidence, that the note of Mary James to the defendant, assigned by her to Alexander, dated 28th November, 1828, was made on an usurious agreement entered into between said defendant and said Alexander, but that the plaintiffs had no knowledge of such usury at the time they were called upon to pay the balance due on the note, nor at any time before, and paid the same under a belief that the same was *bonâ fide* due, and without any knowledge that there was any objection to the validity of said note, and without any notification or communication from the defendant, then the plaintiffs are entitled to recover."

Which instruction, the COURT also refused.

Whereupon the plaintiff's counsel prayed the Court to give the jury the same instruction, with this addition:

"Unless the jury should be satisfied from the evidence, that the said Mary James knew of the said usurious agreement under which the said note was given and assigned as aforesaid."

But the COURT still refused to give the said instruction, so amended.

Whereupon the counsel of the plaintiffs prayed the Court to instruct the jury, as in the former prayer, to the words "communication from the defendant," inclusive, with the following addition, to wit:

"And if the jury believe from the evidence, that the defendant waived and abandoned all objection to the validity of said note, and assented that the same should be considered as a valid and legal obligation, then the plaintiffs are entitled to recover; and it is competent for the jury to infer such waiver and assent, if they shall believe, from the evidence, that the defendant, after obtaining the said money, made payments of interest as the same became due, and expressed her desire and intention to pay the said note, and her anxiety to save her aunt's property from sale, under the said deed of trust."

But the COURT still refused to give the instruction, as thus further amended.

The plaintiffs' counsel then prayed the Court to instruct the jury, "That if they believe from the evidence, that there was no loan of money from Alexander to the defendant, secured by the bond of the 29th of November, 1828, but that the said bond was *bonâ fide* purchased by said Alexander of the defendant, at a discount exceeding the legal rate of interest, the said Alexander not knowing, when he purchased the said bond, that the same was loaned by the said Mary James to the defendant solely to raise money on, the transaction is not usurious, and the plaintiffs are entitled to recover, in this action, the moneys paid by them to Alexander on said bond."

Which instruction, the COURT gave, as prayed.

The plaintiffs' counsel further prayed the Court to instruct the jury, "That if, from the evidence, they should believe that Philip Alexander, when he paid the money, and took the note as aforesaid, intended to buy the said note for the amount given on it, not knowing that the note was made by Miss James to the defendant, in order to raise money on it, and did not mean, by disguising the advance under the form of a purchase, to evade the statute of usury; then such purchase was lawful."

Which instruction, also, the COURT gave, as prayed.

Whereupon the defendant's counsel moved the Court to instruct the jury, as follows, to wit:

"That if the jury find and believe from the evidence aforesaid, that for several months before the execution and assignment of the bond or note mentioned and described in the covenant upon which this suit is brought, there were such negotiations and propositions pending between said John Moncure, (acting in behalf of defendant,) and said Philip Alexander, as are mentioned and set forth in said affidavits of Moncure and Alexander, and in the papers and exhibits therein referred to; that the true and genuine nature and object of such negotiations and propositions, and of the successive arrangements and understandings resulting from them, as really contemplated by both parties, were, that said Alexander should make an advance of money to defendant, upon a future bond or note of said Mary James, payable to defendant, and by her to be assigned to said Alexander, under the name and form of a sale of such bond or note, at a discount above the legal rate of interest; that discount from the amount of such bond or note should be so adjusted as that the difference between the full amount of the bond or note, and the sum advanced on it, should be equivalent to an interest at the rate of 12 per cent. per annum on the sum actually advanced, for the time of forbearance to be given on such bond or note.

"That all the said preliminary negotiations, propositions, and

arrangements, were just before the execution and assignment of the bond or note referred to in the covenant set forth in the plaintiff's declaration, (such bond or note being the same note under seal, or bill obligatory above given in evidence by plaintiffs with the said covenant, and annexed to the said original affidavit of said John Moncure as aforesaid,) terminated in an arrangement so modifying the before-pending propositions and arrangements aforesaid, as that said Alexander should immediately advance the defendant two thousand three hundred and forty dollars, and that defendant should assign to him a note or bond thereafter to be drawn and executed by said Mary James, for such amount as should make the difference between the sum so advanced and the sum to be ultimately received by him for the principal and interest of such bond or note, equivalent to an interest of twelve per cent. per annum on the sum so advanced, according to the principle on which said Alexander, in his aforesaid letter (B 1,) to said Moncure, insisted that the profits of the transaction should be calculated and secured, and that the payment of such bond or note should be collaterally secured by a deed in trust of the land and slaves of said Mary James.

"That the said Alexander, in pursuance and execution of such arrangement and understanding, did advance the two thousand three hundred and forty dollars to defendant, or for her use.

"That the said Mary James, in the pursuance and execution of the same arrangement and understanding on her part, did, afterwards, on the 23th day of November, 1828, execute and deliver the said note under seal, or bill obligatory of that date, and, afterwards, on the 10th December, 1828, duly execute and deliver to said J. Moncure and P. Alexander the said deed in trust, bearing that date, as above given in evidence by defendant, and annexed to the said cross-examination of said Moncure, and marked (D 2); and that the defendant, in the pursuance and execution of said arrangement and understanding, did assign the said bill obligatory to said Alexander, immediately on the execution of the same by said Mary James.

"That the amount of said securities, and the time with which the said Mary James was indulged, by said deed in trust, for payment, were knowingly and designedly calculated and adjusted by and between said Alexander and said Moncure, in behalf of defendant, so as to produce, in the end, a yearly interest of twelve per cent. on the sum advanced, during such time of indulgence; and that the principal and interest secured by the said instruments, were intended and designed, by both said parties, to amount, and did, in fact, amount, to greatly more than the sum so advanced, with legal interest for such time of indulgence as aforesaid; and

did, in fact, substantially secure to said Alexander a yearly interest of twelve per cent. on the sum so advanced by him.

"Then the jury, if they find such facts as aforesaid satisfactorily proved, and fairly deducible from the evidence aforesaid, may properly infer from such facts, and fairly presume, that the transaction was substantially a loan, within the meaning of the statute against usury; notwithstanding it may appear to have been made in the form and name of a sale of the said Mary James's bond or note; and then the jury may, from the same facts and circumstances, if proved and deduced as aforesaid, also properly infer, and will presume, that the sum of money deducted and retained by the said Alexander from the nominal amount of said bond or note, was substantially usurious interest under another name, for the forbearance of the money so lent or advanced."

Which instruction, the Court gave as prayed.

Mr. Jones, for the defendant, contended for the right to open and close the argument to the jury, as the defendant held the affirmative of the issue; and cited Archbold's Civil Practice, 169, 170; *Goodtitle v. Braham*, 4 T. R. 497.

But inasmuch as the plaintiffs were to prove damages sustained by the breach of the covenant, the Court decided that they had a right to open and conclude the argument to the jury.

After the cause had been argued to the jury by *Mr. Dunlop*, for the plaintiffs, and by *Mr. Swann* and *Mr. Jones*, for the defendant, *Mr. Jones* moved the Court to instruct the jury (in explanation of the fourth and fifth instructions prayed by the plaintiffs' counsel, and given by the Court) as follows:

"That if the said note was both drawn and dated after a distinct understanding and agreement had been entered into with the said Alexander to take an assignment of such a note thereafter contingently to be drawn, at a discount exceeding the legal rate of interest, and the said Alexander knew, at the time he took the note, that it had been drawn and assigned for the specific purpose of carrying out the said previous understanding and agreement with him; or if it was understood and known by him, throughout all the preliminary negotiations which led to the final arrangement, that they had reference to a contingent note thereafter to be drawn and assigned for that specific purpose, and that such note was to be framed conformable to such final arrangement when it came to be concluded on between the parties; then it is to be presumed he had sufficient knowledge of the purpose for which said note was drawn by Mary James, within the meaning of the said fourth and fifth instructions, to affect him with the consequences of such knowledge; that is to say, that such knowledge of the specific purpose and object of the parties to the note, was

United States v. White.

sufficient notice that such were the only purpose and object, and that the bond or note was for no other consideration, if such be, in truth, the fact."

Which instruction the Court refused to give; saying that the matter was proper to be left to the jury, to draw such inferences as they should be satisfied ought to be drawn from the evidence in that respect.

Mr. Key, for the plaintiffs, then prayed the Court to instruct the jury, that if they should be satisfied, by all the evidence in the cause, that it was a loan at usurious interest, under cover of a sale, the contract was usurious and void; but if they should be of opinion, from the evidence, that it was a sale and purchase of the bond of Mary James, then it was not usurious.

Mr. Jones, for the defendant, agreed to the instruction, with an addition, saying, in effect, that if the jury found the facts to be as stated in his former prayer, it was a loan, and not a sale.

Mr. Key accepted and agreed to this modification of the instruction.

Verdict for the defendant.

Both parties took bills of exception. The plaintiffs carried the cause to the Supreme Court of the United States by writ of error, where the judgment of this Court was reversed, and a *venire de novo* awarded, at January term, 1839. 13 Peters, 345.

 UNITED STATES v. RICHARD H. WHITE.

That one of the grand jurors, who found the indictment, had previously expressed an opinion that the defendant was guilty of the offence, is no ground for a plea in abatement of the indictment.

Exceptions to grand jurors for favor, are only cause for challenge before they are sworn, or before indictment found, not for a plea in abatement.

The Court will not permit questions to be put to a witness tending to disgrace him, and which he is not bound to answer.

What a deceased witness testified at a former trial of the same cause may be substantially proved. It is not necessary to prove the very words of the deceased witness.

The Court will not permit a witness who was a juror on the former trial to testify what was said by witnesses at that trial in relation to the general reputation of a witness as to veracity.

What a witness testified at a former trial may be given in evidence to discredit him by showing a contradiction between that and his present testimony, without having first asked the witness whether he did not testify to that effect.

THE defendant was indicted for burning the Treasury building of the United States.

A former indictment against the defendant, for the same offence, having been quashed upon demurrer at the last term, because it

appeared, upon the record, that the offence was committed more than two years before the indictment was found; the grand jury found another indictment against him, charging the burning, as before, and that he fled from justice.

Upon this indictment, he pleaded "not guilty," at the last term. He now came in proper person and offered a plea in abatement, that Joseph Forrest, one of the grand jurors who found the bill, had previously expressed an opinion that the defendant was guilty of the offence charged in the indictment.

Mr. Key, Attorney for the United States, objected to filing the plea, because the defendant had already pleaded the general issue, and because the matter pleaded is no ground for plea.

The offence charged being a misdemeanor, the defendant cannot plead both in bar and abatement at the same time, as he might in felony.

Mr. R. J. Brent, for the defendant, cited the following authorities. 1 Burr's Trial, 7, (Carpenter's Report of the case); *The State v. Rockafellow*, 1 Halstead's New Jersey Rep. 332, which was a plea in abatement because one of the grand jurors was not a freeholder. 1 Chitty, Cr. Law, 308, 309; 11 H. 4, c. 9; 2 Viner, 270; Trial, H. d. 3; Co. Lit. 155; 2 Tyler's Rep. 273, 473; 2 H. H. P. C. 155, 167; 2 Hawk. c. 25, §§ 26, 27, 28; 3 Inst. 32, 33, 34.

Burr's case is decisive that it is a good cause of challenge. It is not too late for the defendant to take advantage of it. The plea itself shows why it was not urged as a challenge before indictment found. The defendant is not to be presumed to know that the grand jury are acting upon his case. He may not have been taken; and is generally absent when the indictment is found. 1 Chitty, 308, 309.

Mr. Key, in reply. The case in Halstead's Reports is under a statute of New Jersey, which makes all indictments void if any one of the grand jurors is not a freeholder. Every challenge to a grand juror for favor must be before indictment found. 2 Hawk. c. 25, §§ 16, 18, 23. By the Maryland Act of February, 1777, c. 15, § 10, the want of freehold is no cause of challenge. No challenge can be taken after verdict. 1 Leach, 119, case 58; Gordon's Digest, 752, note; Burr's Trial, 416, 417; *United States v. Fries*, 3 Dal. 517. The cases cited on the other side are cases in which the exception was a general disqualification of the person as a juror; not a particular exception for favor in an individual case. There is no case of challenge of a grand juror for favor after indictment found, and especially after general issue joined.

The COURT (THRUSTON, J., absent,) refused to receive the plea, and said; The authorities which have been cited refer to those

legal disqualifications which render the juror incompetent, in law, to act as a grand juror in any case; and not to objections which go only to the favor in some particular case.

No exception for favor can be taken to a petit juror after he has been sworn; nor has any case been cited, in which an exception to one of the grand jurors, for favor, has been pleaded. The books cited show that challenges to grand jurors must be taken before they are sworn; or before the indictment is found. Exceptions for favor are causes of challenge only, and not grounds for a plea.

It is also an objection to this plea, that it does not, like the plea cited in Halstead's Reports, state what number of the grand jurors found the indictment to be a true bill; and that Mr. Forrest, (the juror referred to in the plea,) was one of that number, and that without his vote the indictment could not have been found. The objection to the juror in that case was a general disqualification to act as a grand juror; and not an exception for favor, which was only a disqualification to act in the particular charge against the defendant.

We think that an exception for favor, which would be a good cause of challenge, cannot be pleaded to the indictment.

After the jury was sworn, *Mr. W. L. Brent*, for the defendant, requested the Court to order several of the witnesses to be kept out of court, and to be kept separate from each other, during the examination of the respective witnesses, on the part of the United States.

The Court ordered the marshal to keep them out of court; but refused to order them to be kept separate from each other.

In cross-examination of William Hicks, a witness on the part of the United States, a question was proposed to be asked whether he was concerned with a certain man in counterfeiting money.

The Court said they had decided, in some case, the name of which was not recollected, that no question should be put to a witness, tending to disgrace him, and which he would not be bound to answer; and said they had, upon that point, considered the following authorities: 2d part, Starkie on Ev. 138, 144, &c.; *Harris v. Tippet*, and *Rex v. Yewin*, 2 Campbell, 638; *Rex v. Watson*, 2 Starkie's Cases, 116; *People v. Herrick*, 13 Johnson, 82; *Resp. v. Gibbs*, 3 Yeates, 429; *Bell's case*, 1 Browne's Rep. 376; *Stout v. Russell*, 2 Yeates, 334; *Galbraith v. Eicleberger*, 3 Yeates, 515; *State v. Bailey*, 1 Penn. Rep. 415; *Jackson v. Humphrey*, 2 Penn. Rep. 728; *Marbury v. Madison*, 1 Cranch, 144; *Peter Cooke's case*, 1 Salk. 153; S. C. 4 State Trials, 748; *Torree v. Summers*, 2 Nott & McCord, 267; *Cates v. Hardacre*, 3 Taunt. 424.

Messrs. Brent & Brent, for the defendant, wished to argue the point and to cite authorities.

But the COURT (*nem. con.*) said they considered the point settled, and refused to hear argument or authorities upon it.

Mr. Key, for the United States, offered to prove what was testified at the former trial of this cause, by *Mr. Howard*, who is since dead ; and cited 2 Russell, 683, and the cases there cited, and *Cornell v. Green*, 10 Serg. & R. 14 ; *Bowie v. O'Neale*, 5 Har. & Johns. 226 ; *Wolf v. Wyeth*, 11 Serg. & R. 149.

Mr. Brent, *contrà*, cited Roscoe, 50 ; *Caton and Veale v. Lenox*, 5 Randolph, Rep.

The COURT (*nem. con.*) permitted *Mr. Key* to prove substantially the testimony of *Mr. Howard*, and said it was not necessary to prove the very words of the witness.

Mr. Brent, for the defendant, then offered to prove, by a person who was one of the jurors at the former trial of this cause, the general reputation of *Mrs. Baldwin* for veracity, from the testimony given respecting her character on that trial.

Mr. Key objected.

The COURT (*THRUSTON*, J., absent,) rejected the evidence.

CRANCH, C. J., said, that the juror could only know that such testimony was given ; but could not be supposed to have thereby acquired a knowledge of her general reputation for veracity.

Mr. Key, without having asked *Mrs. Greer*, whether, at the former trial she testified so and so, (according to notes of her testimony taken at the former trial,) offered to prove what she had so testified, in order to show a contradiction or discrepancy between that and her present testimony.

Mr. Brent, objected that the United States could not regularly prove what she testified at the former trial, without first asking her whether she had so testified.

But the COURT (*CRANCH*, C. J., *contrà*,) overruled the objection, and permitted *Mr. Key* to give other testimony as to what she had testified. See *Starkie*, part 4, p. 1753, 1754, 1755 and 1756.

The cause was argued to the jury by *Mr. Key*, for the United States, and the *Messrs. Brent* for the defendants, from the 8th to the 13th of June, and on the 14th, the jury gave the following verdict : — We find the defendant, on the plea of limitations, not guilty ; and he was discharged.

GAYLOR and SPICER v. EDWARD DYER.

If the vendee of goods on a credit, upon receiving possession of them, agree in writing that they shall remain the property of the vendors until the purchase-money is paid, the vendors may, before payment, maintain replevin for them as their property against the marshal, who has seized them under an execution against the vendee.

REPLEVIN. The marshal had seized an iron chest as the property of one George K. Myers, under a *feri facias* against him. The plaintiffs replevied it as their property, and produced in evidence the following writing, given to them by Myers, upon his receiving from them possession of the chest:

“*Philadelphia*, Feb. 15th, 1836.

“This is to certify that I have this day purchased from C. J. Gaylor & Co., one iron chest for the Union Agency of Washington City, D. C., for which I have given them three notes of one hundred dollars each, payable on the last Friday of May next ensuing, and the said chest is to remain the property of C. J. Gaylor & Co. until the said notes are paid.

GEO. K. MYERS, for

THOS. G. HENDERSON, THOS. GIBBONS.”

“*Witness*, J. B. Pickering.

Upon the trial, the COURT (CRANCH, C. J., giving no opinion,) instructed the jury, at the motion of *Mr. Coxe*, for the plaintiffs, that the said instrument of writing, “is evidence of a conditional sale; and that the chest therein mentioned was, under said agreement, the property of plaintiffs until the payment of the notes given by said Myers; and unless the jury shall believe, from the evidence, that said notes are paid, the plaintiffs are entitled to recover.”

Verdict for plaintiffs.

 BRENT and BRENT v. LAMBERT S. BECK.

If a constable, having a warrant to arrest a man on a charge of forgery, seize and search his trunk, and find therein articles which he suspects were stolen, and takes them into his custody, they are not thereby in the custody of the law, but may be replevied.

THIS was a rule to show cause why a writ of replevin, issued in the name of W. L. Brent and Robert J. Brent, against Lambert S. Beck, should not be quashed, because the goods replevied were in the custody of the law.

The defendant being a constable, and having a warrant to arrest one Henderson, upon a charge of forgery, searched his trunk, and finding therein some articles which he suspected were stolen,

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he took them into his custody, which custody, *Mr. Bradley*, for defendant, contended was the custody of the law, and cited Dalton's Justice, 409; 1 Chitty, Cr. Law, 819, 865, 867.

The COURT, (THRUSTON, J., absent,) stopped Mr. Brent, who was about to reply, and refused to quash the replevin. CRANCH, C. J., observed, that the property did not appear to have been in the custody of the law. Mr. Beck may have done right in taking the goods, but having no warrant therefor, or to arrest Henderson for theft, his custody was not the custody of the law, so as to make it any contempt of this Court, or of any court, to replevy them.

Rule discharged.

DORCAS WALKER v. ALEXANDER HUNTER.

The Court will not, in replevin, order a *non pros* at the motion of the defendant after the jury is sworn.

In replevin the plaintiff may recover according to the extent of his title proved.

Form of verdict when the plaintiff proves a title to a part only, of the goods replevied.

REPLEVIN; pleas, *non cepit*, and property in the defendant. The defendant, as marshal of the District of Columbia, took the goods in execution as the property of Richard Ballard. The plaintiff claimed under a deed of trust to the plaintiff, dated June 19, 1834, to secure her about \$900, due upon two promissory notes of the same date. By the terms of the deed, the property was to remain in the possession of Ballard, until the plaintiff should think proper to take possession of it to execute the trust.

After the jury was sworn, and the plaintiff had adduced her evidence, *Mr. Morfit*, for the defendant, moved the Court to order a *non pros*, because the plaintiff had shown title only to part of the goods replevied.

But the COURT, (THRUSTON, J., absent,) refused.

Mr. Bradley, for the plaintiff, contended that the plaintiff may recover as much of the property as he proves title to; and that the jury should in their verdict specify the property to which the plaintiff has made title, and the value thereof, and of the goods replevied, and assess the plaintiff's damages. *Rogers v. Arnold*, 12 Wendell, 30; 2 Evans, Harris, 342, No. 152, and No. 153, for the form of the verdict.

The jury found the following verdict: "We do say that the property in the declaration mentioned was taken by the defendant; and we further say that, as to the goods and chattels in the declaration mentioned, except one cane-seat rocking chair, two sets of castors, one work-stand, one side table, two foot-stools,

and tray and snuffers, the property in them was in the plaintiff, as she hath alleged, and the value of the said goods and chattels is \$413.75, and we assess her damages by occasion of the premises to the sum of ten dollars; and we further say the property of the said cane-seat rocking chair, two sets of castors, one work-stand, one side table, two foot-stools, and tray and snuffers, was not in the said plaintiff as she hath alleged, and the value of the same is seventeen dollars and fifty cents."



PETER E. FREVALL v. F. BACHE, Administrator of J. Dabadie.

A commission to take a deposition in a foreign country may issue for the plaintiff *ex parte* by order of the Court, or of a judge in vacation, if the opposite party does not file his cross interrogatories within five days next after the rule-day after the plaintiff shall have filed his interrogatories, provided his interrogatories shall have been filed ten days before the rule-day; and it is not necessary to give notice to the opposite party of the filing of the interrogatories; nor is it necessary that the party or the commissioner should give notice to the opposite party of the time and place of taking the deposition in a foreign country. But it must appear that the commissioner took the oath annexed to the commission.

Mr. Key, for the defendant, objected to a deposition of one Fournier, taken under a commission to D. C. Croxall, the United States Consul at Marseilles, in France, because, 1st. The commission was issued *ex parte* without notice to the defendant of an application for the commission, or of the filing the plaintiff's interrogatories. 2d. Because it was inclosed in an envelop directed to the Chief Judge of the Court, when, by the commission the commissioner was required to "send the same to the judges," and 3d. Because it does not appear that the commissioner took the oath annexed to the commission as he was required by the commission to do.

On the 17th of May, 1837, the plaintiff filed his interrogatories, more than ten days before the rule-day, which was the first Monday in June. On the 23d of June, more than five days after the rule-day, the plaintiff filed a petition for a commission, which was ordered, and on the 8th of July was issued to Daniel C. Croxall, Esq., United States Consul at Marseilles. On the 16th of November, the commission was returned with the deposition in an envelop, directed "To the Hon. William Cranch, Chief Judge of the Circuit Court for the County of Washington, District of Columbia."

By the Maryland Act of 1785, c. 72, § 14, the parties have a right to be present at the execution of all commissions for taking evidence, &c. For this purpose, the opposite party must have notice. It is also required by the dictates of natural justice.

Ten Broeck v. Pendleton.

Mr. R. S. Coxe, contra. The 26th rule of equity practice for the circuit courts of the United States, says, "All testimony taken under a commission, shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule-day; after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right."

The Act of Maryland is applicable only to commissions executed in that State.

In the case of *Grant v. Nailor*, 4 Cranch, 224, 231, one of the objections overruled by the Court was, that there was no notice of the time and place of executing the commission; and no cross-interrogatories were filed.

Mr. Smith, the deputy clerk of this Court, stated that the practice, ever since the rule of the Supreme Court, had been to file the interrogatories ten days before a rule day; and if the opposite party does not file cross interrogatories within five days thereafter, the commission issues upon the order of the Court, or of a judge in vacation, without notice of the motion.

MORSELL, J., stated that such also was the practice in Maryland.

The COURT (THRUSTON, J., absent,) overruled Mr. Key's two first objections, but rejected the deposition because it did not appear that the commissioner had taken the oath annexed to the commission.

RICHARD TEN BROECK v. E. H. PENDLETON, Garnishee of E. C. Moore.

An attachment to answer in a plea of trespass on the case, founded upon a promissory note having a scrawl for a seal, will be quashed, and the plaintiff will not have leave to amend, nor to declare in debt.

THIS was an attachment under the Maryland Act of 1795, c. 56, to compel the defendant to answer to the plaintiff "in a plea of trespass on the case." The *capias* was also to answer in a plea of trespass on the case. The short note was in these words: "The cause of action in this case, is a promissory note drawn by the said Edmund C. Moore, in favor of the said plaintiff, dated Baltimore, 24th October, 1835, at one day after date, for \$450, now due and unpaid."

The promissory note, produced in evidence, and which was annexed to the order of the justice, for the attachment, was as follows:

Mason v. Cutts.

" \$450. Baltimore, October the 24th, 1835.

" One day after date, I promise to pay R. Ten Broeck, or order, the sum of \$450. EDMUND C. MOORE, [L. S.] "

Mr. Brent, appeared for the garnishee, and moved the Court to quash the attachment, because it is to answer in a plea of trespass on the case, when the cause of action is in debt; the note being under seal. The case of *Trasher v. Everhart*, 3 Gill & Johnson, 235, is decisive.

Mr. Bradley, for the plaintiff. The practice here is different from that in Maryland. There, the short note is considered as a declaration; but here, if the defendant appears to the *capias*, the plaintiff may file a declaration, in any form of action in case or debt. The only object of the attachment is to compel an appearance. *Barry v. Foyles*, 1 Peters, 311, 314.

But the Court will give leave to amend, if the justice of the case requires it; as in the cases of *McCloud v. Colman*, and *Cooper v. Hardy*, in this Court.

The decisions of the Maryland courts since the separation, are not binding upon this Court. *Wallingford v. Allen*, 10 Peters, 583.

The COURT (CRANCH, C. J., *contra*,) was of opinion, that the attachment should be quashed.

Mr. Bradley then moved to amend the short note, by stating the instrument to be under seal, and to declare in debt. There is no bail to be injured by the amendment. The property of the debtor, himself, is attached. The motion to quash is made really by the defendant, through the garnishee.

The COURT refused leave to amend by changing the action from case to debt, because the short note of the cause of action would not have given the defendant the notice which the act contemplates.

The attachment was quashed, because it was to compel the defendant to answer in an action of trespass on the case, when the cause of action was in debt upon a sealed instrument.

GILBECK MASON, Administrator of James Leveaux v. HIRAM CUTTS, Administrator of Thomas Brown.

Advances to a master of a ship seized and carried into France, in 1810, and liberated after eighteen months' detention, made after her release, to enable her to prosecute her homeward voyage, are not a lien upon the compensation awarded to the administrator of the owner, by the commissioners under the French convention. The plaintiff must resort to the administrator of the owner for payment in the ordinary course of administration; especially if the person making the advances takes bills of exchange for the amount advanced.

BILL in equity by the administrator of James Leveaux against

the administrator of Thomas Brown, to which the defendant filed a general demurrer.

The bill stated that in 1810, the ship *General Eaton*, J. S. Place, master, owned by Thomas Brown, a citizen of the United States, was captured by a French privateer and carried into Calais. That in 1812 she was liberated, but before she could proceed on her homeward voyage, it was necessary that she should undergo considerable repairs, and be fitted for the voyage; that Captain Place not having the funds for that purpose, applied to the deceased, (Leveau,) who made the necessary advances therefor to the amount of 20,463 francs, including costs of protest and damages on certain bills of exchange drawn by Captain Place, on his correspondents in London, for the reimbursement of said advances; that the ship was afterwards seized and detained at an English port; that the advances have never been repaid, and that the owner, Thomas Brown, died insolvent; that the commissioner under the French treaty, allowed the claim of Hiram Cutts, administrator of the owner, Thomas Brown, for detention of the ship, and expenses, to the amount of \$4,687; a certificate of which is about to be issued from the Treasury of the United States, which will be paid to the said Hiram Cutts, unless prevented by an order of this Court. That the plaintiff has a just claim on the amount so awarded to the said Cutts, for the amount of his said advances, "and is entirely without remedy at law to obtain the benefit of his lien on said fund, and can only obtain the same by the equitable interference of this honorable Court."

The plaintiff contends, in his bill, "that he is not bound to resort to the estate of said Brown, or to those funds thus awarded, as a general creditor of said Brown's estate, but that he has an equitable claim on the fund itself, for the amount of his advances as aforesaid, and the interest due thereon, which he believes will amount to as much as the sum to be received on said award," and prays a decree therefor, and for general relief.

Mr. Key, for the plaintiff, cited *Sheppard v. Taylor*, 5 Peters, 692, 710; *The General Smith*, Hollins's Claimant, 4 Wheat. 438; *Forster v. Hale*, 3 Ves. 696; *Duke of Bolton v. Williams*, 4 Br. C. C. 430.

Mr. R. S. Coxe, contra. The plaintiff's intestate never had any lien on the ship for his advances; and if he had, he has none upon the money awarded, which does not represent the ship, but merely demurrage, and expenses of prosecuting the claim before the French tribunals. But whatever lien he might have had, he abandoned by taking bills of exchange for the amount of his advances, and by suffering the ship to depart. He can now claim only as a general creditor, and must look to the administrator in the regular course of administration. This case is very different

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from that of *Sheppard v. Taylor*, where the award was for the loss of the ship, and stood in the place of the ship, and liable to all liens by which the ship was bound.

The COURT (THRUSTON, J., absent,) decided, that the plaintiff's intestate had not a specific lien on the ship; and if he had, he abandoned it when he received bills of exchange for the amount of his claim, and therefore he can only come in as a general creditor of Brown, and receive his dividend in the due course of administration.

JOHN SMITH v. ALEXANDER HUNTER.

A deed, from one to another, of personal property, to be void if the grantor shall on demand pay a certain sum to the grantee, is void, in law, as to the creditors of the grantor, unless the possession accompanied and followed the deed, although acknowledged and recorded agreeably to the Act of Maryland of 1729, c. 8, § 5, 6.

REFLEVIN, for a hackney-coach and two horses, taken by the defendant as marshal of the District of Columbia, under a *feri facias* against one William Smith, the brother of the plaintiff. Plea, property in the defendant, and traversing the title of the plaintiff.

The plaintiff claimed title under a deed from the said William Smith, dated May 21, 1833, duly acknowledged and recorded on the same day, agreeably to the Act of Maryland of 1729, c. 8, § 5 and 6. The consideration was stated to be \$333; and the deed was to be void if William should pay the said sum and interest to John on demand. John lived in Annapolis, William in Washington, and the carriage and horses always remained in the possession of William, until seized as his property by the marshal under an execution against William.

Messrs. Brent & Brent, for the plaintiff, contended, that as the deed was duly acknowledged and recorded agreeably to the Act of 1729, c. 8, § 5 and 6, it was not necessary that the possession should accompany and follow the deed, in order to protect the property from creditors; the acknowledgment and record being substituted for possession.

But the COURT, (MORSELL, J., *contrà*,) at the prayer of *Mr. Marbury*, for the defendant, instructed the jury, that if they should be satisfied, by the evidence, that the possession of the property did not accompany and follow the deed, it was fraudulent, in law, as to the creditors of the said William Smith, although acknowledged and recorded agreeably to the act.

CRANCH, C. J., observed, that it did not appear to have been

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the intention of the legislature to make valid against creditors any deed which would be void, as to creditors, by the common law.

A motion for a new trial was made, but was refused at November term, 1838.

NOTE. On the 7th of July, 1838, Congress established a Criminal Court for the District of Columbia. THOMPSON F. MASON, Esq., of Alexandria, was appointed Judge of that Court, and held one session in Alexandria, and one in Washington, but was too ill to hold the December session in Washington, and died on the 21st of December, 1838. JAMES DUNLOP, Esq., of Georgetown, was appointed in his place, and sworn in about the 9th of January, 1839.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1838, AT ALEXANDRIA.

TARLTON T. HENDERSON *v.* JOHN HENDERSON'S ADMINISTRATOR.

A chancery attachment will not lie against the effects of a deceased person.

CHANCERY ATTACHMENT of slaves, the property of the deceased John Henderson, for a debt due by him, in his lifetime, to the plaintiff.

Mr. Semmes, for the defendant, moved the Court to quash the attachment. The effects of a deceased person are not liable to be attached for debts due by him in his lifetime. They can only be administered by the executor or administrator according to law. The Virginian administrator has a right to sue in this Court, and recover the property. He is not bound to give security upon dissolving the attachment. *Wilson v. Wilson*, 1 Hen. & Mun. 15; *Wilson v. Kooutz*, 7 Cranch, 202; 1 Story's Equity, 549.

Mr. Taylor, contra. The sureties of the Virginian administrator are not liable for assets in the District of Columbia. Story's Conflict of Laws, §§ 462, 524.

The COURT (THRUSTON, J., absent) ordered the attached effects to be discharged.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1838, AT ALEXANDRIA.

PETER SAUNDERS'S HEIRS *v.* THOMSON F. MASON.

If there is no person in existence competent to receive payment of the debt, to secure which property has been conveyed in trust, the Court will, after a lapse of sixteen years, decree a conveyance by the trustee to the heirs of the debtor.

BILL IN EQUITY by the heirs of Peter Saunders, stating that their ancestor conveyed a real estate to the defendant, Thomson F. Mason, in trust to secure a debt due by him to the Franklin Bank, whose charter expired sixteen years ago, and there has not since been any person competent to receive payment of the debt; and praying that the property may be conveyed to plaintiffs.

The facts were admitted by the defendant, the trustee.

Mr. Semmes, for the plaintiffs, cited *Cruise*, tit. 12, Trust, c. 1.

The COURT (MORSELL, J., absent,) decreed a conveyance, according to the prayer of the bill.

A. R. FRASER AND W. S. ALEXANDER AND WIFE *v.* ALEXANDER HUNTER AND ROBERT BALL.

When the question is upon a disputed boundary line, the Court will not permit hearsay evidence to be given that a particular object, (such as a spring,) was on the land of one of the parties.

The possession of a person claiming title without definite metes and bounds, will not, in law, be deemed to extend beyond the actual possession proved.

A husband, who has conveyed all his estate to a trustee for the sole and separate use of his wife, may join with her in an action of trespass *quare clausum fregit*, and in law would be entitled to the damages recovered, although in equity he might be considered as receiving them in trust for the separate use of the wife.

A deed of bargain and sale by a person not in possession conveys no title.

There must be actual possession by the plaintiff, of the *locus in quo*, at the time of the supposed trespass.

The plaintiff must prove every abuttal set forth in his declaration. Boundaries may be proved by hearsay.

All the plaintiffs must have a right to recover, or none can recover. There must be a joint cause of action.

TRESPASS quare clausum fregit.

Mr. Brent, for the plaintiff, offered to prove by a witness, that some years ago, Simon Summers, an old and legal surveyor of the county of Alexandria, who is now dead, showed the witness a line of Chapman's land, under whom the defendants claim to hold, at or near Hall's Spring, and stated to the witness that Hall's Spring was on the land of the Alexanders; to which evidence the defendants objected, and the COURT (*THRUSTON, J.*, absent,) refused to permit the same to be given; to which refusal the plaintiffs took a bill of exceptions.

The plaintiffs offered in evidence a trust deed, dated April 20, 1807, (under which the plaintiffs claim,) from the plaintiff W. S. Alexander to Baldwin Dade, (the father of Mrs. Alexander, wife of W. S. Alexander, and one of the plaintiffs,) conveying "all his right, title, and interest in any lands lying between the lines north six west, and north seventeen west, supposed to be the west boundary of Howison's Patent," without describing his claim by metes and bounds; and contended, that as they had proved Mrs. Alexander's possession east of the disputed line, such possession was evidence of his possession up to the line north seventeen west, including the land in dispute.

CRANCH, C. J., was of opinion that as the deed did not describe the lands conveyed by W. S. Alexander to Mr. Dade, by metes and bounds, his possession could not be considered as extending beyond his actual possession proved. *Ellicott v. Pearl*, 10 Peters, 442.

MORSELL, J., was of opinion that the deed should go to the jury with such parol evidence as had been given.

The plaintiffs, however, gave subsequent evidence of acts of possession, by cutting wood for fuel and other purposes, on the disputed lands, by the son of the plaintiff Walter S. Alexander, about sixteen years ago, and then the COURT (*THRUSTON, J.*, absent,) permitted the deed to be read in evidence to the jury.

The Court also permitted the following question to be asked of the plaintiffs' witness, Mrs. Zimmerman: "Do you know, by general reputation, any of the lines, or boundaries, or corners, of Mr. Walter Alexander's land?"

She answered, No; but said that Hall's Spring was generally reputed to be on Alexander's land; but the Court said that that was not admissible evidence. They, however, permitted her to be asked whether Hall's Spring was generally called "the head

of long branch?" that being one of the calls of Robertson's Patent. See *Leland v. Wilkinson*, 6 Peters, 317; *Ellicott v. Pearl*, 10 Id. 412.

The COURT also permitted the declarations of the plaintiff W. S. Alexander, to be given in evidence by the defendants, although he had conveyed all his estate to a trustee for the sole use of his wife, (who is also a plaintiff,) it being an action of trespass *quare clausum fregit*, and not a real action; and the damages, so far as his wife is to participate in them, will, at law, become the property of her husband, although in equity he might be considered as a trustee of them for her separate use.

Mr. Taylor, for the defendants, moved the Court to instruct the jury, that upon the plaintiffs' evidence they cannot recover.

1. Because one of the plaintiffs, by their own showing, has no interest. After his deed to Dade, W. S. Alexander was only the agent of Dade, and of his wife, and in that character cannot maintain an action for a trespass; and if an improper party is one of the plaintiffs, it is a misjoinder, and there must be a nonsuit. 1 Chitty's Pleadings, 54; *Goodtitle v. Morgan*, 1 T. R. 758.

2. Because the plaintiffs have not proved possession at the time of the supposed trespass. Com. Dig. 377, tit. Trespass, B. 3; *Wells v. French*, 4 Mass. Rep. 64; *Stuyvesant v. Tompkins*, 9 Johns. 61; *Dunham et al. v. Stuyvesant*, 11 Johns. 569; 5 Dane's Ab. 553, 554; *Wilde v. Cantillon*, 1 Johns. Cases, 123; *Graham v. Peat*, 1 East, 244.

Mr. R. J. Brent, contra, admits that if there has been a misjoinder it is fatal. But this is not a misjoinder, because in all actions to vindicate the rights of the wife against a stranger, the husband must be joined; although he has no personal interest in the event of the suit. *Cookson v. Castline*, Cro. El. 96; *Weller v. Baker*, 2 Wils. 423.

The deed of trust for the benefit of the wife cannot be set up to defeat her right of action. She as *cestui que trust* has a right of action for a trespass upon her possession, and her husband "must be joined for conformity." *Hopkins v. Ward et al.* 6 Munford, 38; *Ricard v. Williams*, 7 Wheat. 59; *Smith v. Lorillard*, 10 Johns. 347; *Catteris v. Cowper*, 4 Taunt. 547; *Ewen v. Burnett*, 11 Peters, 53; 7 Com. Dig. 510, tit. Trespass, B. 2. Possession alone is sufficient to support the action against a mere wrong-doer. *Graham v. Peat*, 1 East, 246. Mrs. Alexander is one of the heirs at law of the deceased Baldwin Dade, the trustee, and is also the *cestui que trust*, and is therefore properly made one of the plaintiffs; and if she is entitled to sue, her husband must also be made a plaintiff. *Brotherson v. Hodges*, 6 Johns. 108; 1 Saunders, note g.; 2 Tuck. Bl. 218; *Harper v. Chatesworth*, 4 B. & C.

574; *Catteris v. Cowper*, 4 Taunt. 546; *Ellicott v. Pearl*, 10 Peters, 442. To constitute actual possession, it is not necessary that there should be any fence or inclosure on the land. *Ibid.*; *Ewen v. Burnett*, 11 Peters, 52; *Lessee of Sicard v. Davis*, 6 Peters, 139, 140; *Jackson v. Lund*, 3 Johns. Ca. 118; *Hunt v. Wickliffe*, 2 Peters, 204; *Pendleton v. Alexander*, 8 Cranch, 462; *Jackson v. Reed*, 18 Johns. 44; *Ricard v. Williams*, 7 Wheat. 105; *Lessee of Clarke v. Courtney*, 5 Peters, 354, 356.

Mr. Brent proposed to ask young *Mr. Alexander* (who had testified that about sixteen years ago he had gone upon the land now in dispute and cut wood upon it,) whether, at the time of his going upon the land in dispute he did so under a claim of title by his father and mother up to the line N. 17 west, the supposed west line of *Howison's* patent; but

The COURT (*MORSELL, J., contra*,) refused to permit the question to be asked, because no title was shown by metes and bounds up to that line, and therefore there can be no constructive possession to that line.

Mr. Coxe in reply, as to the defendant's motion to instruct the jury that the plaintiffs cannot recover upon their evidence, contended that the plaintiffs must prove all their abutments, which they have not done. *Martin v. Kesterton*, 2 W. Bl. 1089; 5 Dane's Ab. 594; 2 Salk. 453; 2 Chitty, 388, note n.; Bul. N. P. 89.

The deed from *W. S. Alexander* to *Dade*, under which the plaintiffs claim, is only of his interest in any lands in *Howison's* patent lying between the lines north 6 west, and north 17 west; and bounded on the north by *Mason's* land, on the west by the *Glebe*, and on the east by *Custiss's* land.

There is no evidence that the *locus in quo* is in *Howison's* patent, nor is that patent located on the plat.

There is no evidence that it is bounded on the north by *Mason's* land, nor on the west by the *Glebe*, nor on the east by *Custiss's* land.

It is admitted that possession alone will maintain trespass against a mere wrongdoer; and the plaintiffs, if they can recover in this action, must recover upon their possession alone, for they have not made out a title. There is no evidence of any possession by *Fraser*; and as all must have a joint cause of action, or none can recover, it is evident that the plaintiffs cannot recover in this action. Besides, there is no evidence that *Alexander* was in possession at the time of his deed to *Dade*. And a deed of bargain and sale without possession in the bargainor is void. There is no evidence of possession until about the year 1822, and the deed was made in April, 1807. *Peters v. Condron*, 2 Serg. & R. 83; *Wickham v. Freeman*, 12 Johns. 183. *Mr. Alexander*

Lupton v. Janney.

had no possession at the time of the supposed trespass, and therefore is improperly made a plaintiff in the cause. *Star v. Jackson*, 11 Mass. Rep. 519; 15 Petersdorff's Ab. 148.

As to the abutments, *Mr. Brent* cited *Roberts v. Karr*, 1 Taunt. 497, and *Durgin v. Leighton*, 10 Mass. Rep. 56.

The COURT (*nem. con.*) was of opinion that the plaintiffs could not recover upon the evidence, for the reasons stated in the argument of the defendant's counsel.

The plaintiffs became nonsuit, acquiescing in the opinion of the Court.

ANN LUPTON v. P. JANNEY, Executor of D. Lupton, Junior.

The settlement of an administration account by the Orphans' Court is conclusive upon this Court as against distributees and residuary legatees, except by appeal; although not conclusive against creditors upon a question of *devastavit* or *plene administravit*. It is a part of the ordinary duty of the Orphans' Court to ascertain and distribute the surplus, or *residuum* of a deceased person, and, for that purpose, to settle the administration account. The jurisdiction of that court in that matter is original, peculiar, and exclusive. An original bill, in the Circuit Court, to compel an executor to account with a residuary legatee, and not necessarily connected with any other ground of equitable jurisdiction, is a bill asking that court to do what originally belongs exclusively to the Orphans' Court to do. The Circuit Court has not jurisdiction of such an original bill.

A court of equity will not lend its aid to enforce an unconscientious claim.

It is a matter within the discretion of an executor whether he will incur the expense of a suit against a known insolvent debtor of the estate.

Mere lapse of time is not alone a bar to the opening of an executor's accounts; but long acquiescence in the settlement of an administration account may make it against conscience to seek to open it.

BILL IN EQUITY to open an executor's accounts after they had been settled more than twelve years in the Orphans' Court.

The plaintiff was the widow and residuary legatee of David Lupton, junior, and the defendant was his acting executor. The other executors were David Lupton, the father of the testator, and John McPherson, the father of the plaintiff. They all qualified, but as the defendant was the only one of the three residing in Alexandria, he took upon himself the whole burden of the administration. The bill states that the defendant rendered an inventory and sundry accounts to the Orphans' Court, by which it appeared that the estate was insolvent, and that the defendant was in advance for it. That the last account was rendered on the 5th of January, 1821. That the testator died in 1814. That if the accounts had been settled upon proper principles the estate would have been not only solvent, but a very handsome *residuum* would have remained to the plaintiff as residuary devisee.

That the defendant should be charged with several debts due to the testator's estate which he might and ought to have col-

lected; namely, \$4,083.50, due by John McPherson & Son; \$263.50 due by the same to Abijah Janney & Co., and assigned to the testator; \$225, for plaster due by the same, and \$140 due by the same to the testator upon open account; \$223, due by Thomas Neil; and \$4,959.43, which he charged as paid to Peter Saunders "without sufficient or legal evidence that the money was in fact due." That there might be many other debts due to the testator which have been lost by the defendant's negligence, as he had returned to the Orphans' Court no list of debts, either sperate or desperate. The bill then prays that the defendant may render a due list of debts due to the testator at the time of his death; that the administration accounts may be all opened, and that a new and full account may be ordered to be taken; and it also prays for general relief. The bill was filed at May term, 1823.

The defendant, "saving to himself the benefit of exception to the jurisdiction of the Court on the matter stated in the complainant's bill," and to the many errors, &c., answers, and among other things, admits that he returned the inventory and settled the accounts with the Orphans' Court, as stated in the bill; and that the plaintiff was not present at, nor summoned to attend at the said settlements; but avers that they were legally made before a court having full jurisdiction of the matter, in the due course and regular exercise of its jurisdiction; and he relies on the said settlements in bar of the jurisdiction of this Court, as a court of original jurisdiction, in the case stated by the plaintiff, in the same manner as if the same were specially pleaded.

The defendant, not waiving this defence, further answered, among other things, that the said Peter Saunders was a fair and *bona fide* creditor of the testator to the full amount of all payments made to him by the defendant as executor, after deducting all proper credits. He admits that no security was taken on the sale of the flour to John McPherson & Son; but denies that he is chargeable with negligence on that account. He states that the firm of John McPherson & Son was composed of John McPherson, the plaintiff's father, who was one of the executors, and Daniel McPherson, her brother. That she had given the executors a written authority to sell the real and personal property either at public or private sale, as they might deem most advantageous, a copy of which is exhibited.

That when the flour was sold to John McPherson & Son, they were in good credit, and engaged in extensive business in Alexandria. That the flour was in store at the death of the testator, in November, 1814. That the sale was made on the 17th of April, 1815, on a credit of six months. That in May, 1816, the defend-

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ant succeeded in obtaining the note of John McPherson & Son, for \$1,000, on account of the sale, with the said Peter Saunders as indorser; but they always refused to give their notes for any further amount, contending that the testator's estate was indebted to them in an amount equal, or nearly so, to the balance due for the flour. That in settlement with Saunders he was charged with the note of \$1,000, and the testator's estate had credit for it.

As to the note of John McPherson & Son for \$263.50, and Thomas Neil's note for \$223, he says they were taken by Peter Saunders, one of the firm of Abijah Janney & Co., (which firm was composed of Abijah Janney, the said Peter Saunders, and the testator, David Lupton, jr.,) for one-third of the debts due to that firm by the said John McPherson & Son, and the said Thomas Neil respectively, and were delivered by Saunders to the defendant, (but not until March, 1817,) as the testator's share of the said debts; and that the said John McPherson & Son, and the said Thomas Neil were insolvent when the said notes were taken, and the defendant did not think himself warranted in incurring the expense of suits against them.

That the defendant has fully accounted for all the plaster belonging to the estate which came to his hands.

That since his final account was rendered, the said John McPherson and Peter Saunders, have departed this life, by which the defendant is deprived of the benefit of their testimony.

That the defendant did return to the Orphans' Court a list of debts due to the testator's estate, a copy of which is exhibited.

That as to the debt of \$140 by open account, supposed to be due from John McPherson & Son, they would only allow it as a discount to their claim against the testator's estate, and the defendant had no evidence but their qualified admission.

And that Abijah Janney was also insolvent.

In March, 1837, the plaintiff filed a supplemental bill charging that the defendant had obtained letters testamentary also in Fairfax county, in Virginia, and sold property there to the amount of \$8,000 or \$9,000, of which he had rendered no account, &c.

The answer of the defendant to this supplemental bill, avers that he had, long since, rendered his account of that administration to the County Court of Fairfax which has been confirmed by that court and recorded; and also that his settlements of accounts with the Orphans' Court of Alexandria embrace the Virginia assets, and present a full statement of both administrations. He also relies upon the Act of Virginia of the 8th of March, 1826, "for the limitation of actions against persons acting in a fiduciary character, and their sureties, and for other purposes," as a complete bar to any opening of that Virginia account. And he

relies also on the lapse of time as to the whole matter of the accounts.

He also states that since his answer to the original bill, circumstances have come to his knowledge which induce him to believe that John McPherson & Son were entitled to the credit which they claimed against their purchase of the flour, viz.: that he (this defendant,) had obtained the original note of the testator to John McPherson & Son for \$1,600, dated 11 mo. 12, 1814, a few days before the testator's death, which note had upon its face their order to credit the proceeds to the account of the testator. That the note was discounted by the Bank of Potomac for the use of the testator, and the proceeds placed to his credit in that bank; and that it was taken up by the friend and nephew of John McPherson, and therefore was a proper set-off against the flour.

By his will, the testator devised all the residue of his estate, after payment of his debts and those of the firm of Abijah Janney & Co., of which he was a partner, to his widow, the plaintiff. The will is dated 24th November, 1814, and was proved on the 2d of December, 1814.

The accounts of the defendant settled in the Orphans' Court, and produced by the plaintiff, show that the defendant has accounted for all the assets which came to his hands.

A number of depositions were taken, by which it appeared that John McPherson & Son were in good credit and doing an extensive business at the time of their purchase of the flour, but that they stopped payment on the 7th of June, 1816. The evidence confirmed and corroborated the defendant's answer.

CRANCH, C. J., after stating the substance of the bills, answers, and evidence, delivered the opinion of the Court, as follows:

The first question which occurs in this case is, whether this Court has original jurisdiction of a bill by a residuary legatee to surcharge and falsify accounts of an executor, stated, settled, and allowed in the Orphans' Court.

Upon this question, I have had considerable doubt; but upon looking into the case of *Beatty v. The State of Maryland*, 7 Cranch, 281, I am inclined to the opinion that the settlement of the accounts by the Orphans' Court, is conclusive upon this Court, as against distributees and residuary legatees; although not against creditors upon a question of *devastavit*, or *plene administravit*. Mr. Justice Duvall, in that case said, "the account was only binding upon the representatives of the estate, the distributees; and they might still open it in the General Court. But the creditors are no parties to the settlement of the accounts, and cannot be bound by it."

The question, in that case, arose upon the issue of *devastavit*

vel non. The bill, in the present case, calls upon this Court to do that which the Orphans' Court, upon a bill or petition, had the power to do, and which it was the proper business of that court to do, viz., to open the account so far as to permit the residuary legatee to surcharge and falsify. It is the proper function of that court to see that the *residuum* of the estate is properly distributed; and its original jurisdiction of that matter seems to be exclusive.

By the Act of Congress of the 27th of February, 1801, § 12, [2 Stat. at Large, 103,] the judge of the Orphans' Court, in each county in this district, has all the powers, and is to perform all the duties then exercised and performed by the judges of the Orphans' Courts in Maryland; and an appeal is given to this Court, "who shall therein have all the powers of the Chancellor of that State."

By the Maryland law of 1798, ch. 101, c. 15, § 1, the Orphans' Court is established, "for the purpose of taking probate of wills, granting letters testamentary, and of administration; directing the conduct, and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons according to law."

And by § 12, it is enacted, that "the Orphans' Court shall have full power, authority, and jurisdiction, to hear, examine, and decree upon all accounts, claims, and demands existing between wards and guardians; and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators; and may enforce obedience to, and execution of, their decrees, in the same ample manner as the Court of Chancery may."

This is a peculiar and exclusive original jurisdiction. An original bill, in this Court, to compel an executor to account with a residuary legatee, and not necessarily connected with any other ground of equitable jurisdiction, is a bill asking this Court to do that which originally belongs exclusively to the Orphans' Court to do. It is a part of its ordinary duty to ascertain and distribute the surplus, or *residuum* of the estate, and for that purpose to settle the administration account. When that account necessarily and incidentally comes before this Court, either as a court of equity, or of law, in a suit, of which this Court has original jurisdiction, the *ex parte* settlement by the Orphans' Court would probably be taken to be *primâ facie* correct, but the opposing party would have a right to surcharge and falsify, and the Court would open it for that purpose; but if the settlement had been made by the Orphans' Court, in a contested case between the same parties, it would probably be deemed by this Court conclu-

sive until it should be reversed upon appeal. But in an *ex parte* settlement without notice to the residuary legatee, he could not appeal; for an appeal can be taken only by a party to the contest, and if there be no contest, there can be no appeal. But he might call the executor before the Orphans' Court, by a bill or petition, charging errors in the accounts as settled, and praying that he may be permitted to surcharge and falsify the accounts, &c., and from the decree of the Orphans' Court, upon such a bill or petition, either party would have a right to appeal to this Court. If, however, the executor's accounts should not have been settled by any definitive decree or order of the Orphans' Court, they would be entirely open, and the residuary legatee might file his bill or petition in that court for a settlement of the whole account; upon which proceeding the whole account would be open, and must be supported *in toto* by proper vouchers, in the due course of administration.

This seems to me, from the best consideration which I have been able to give the subject, to be a correct view of the case; and I am, therefore, led to the conclusion that this Court has not jurisdiction of an original bill to revise a settlement of an executor's account made by the Orphans' Court; or to call the executor before us, to render an original account. I do not mean, however, to say that if the accounts of an executor, settled *ex parte* in the Orphans' Court, without notice, should incidentally come before this Court in a suit, of which this Court has original jurisdiction, and the correctness of that settlement should be questioned, this Court would not permit the opposing party to surcharge and falsify. All I mean to say, is, that the settlement of an administration account is not an original ground of jurisdiction of this Court, either as a court of equity, or of law.

The only ground of jurisdiction asserted in the present bill, is error in the settlement of the executor's account, by the Orphans' Court; and the alleged errors are in not charging the executor with legal laches in not pushing his legal rights to the utmost extent of the law. If the decree or order of the Orphans' Court be, for that cause, erroneous, we think that the plaintiff's remedy was either an appeal, or a bill or petition to open the settlement.

But if we err in this opinion, and if we are bound to take cognizance of the cause, we think that, under the circumstances of this case, it is unconscientious in the plaintiff to assert what she supposes to be her legal right. And if she cannot, with a good conscience, assert her claim, a court of equity ought not to lend its aid to enforce it.

The facts of the case, as we collect them from the evidence, are these. All the parties concerned in this suit were nearly con-

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nected by consanguinity or affinity ; and had confidence in each other. The plaintiff was the daughter of John McPherson, and sister of Daniel McPherson, who constituted the mercantile firm of John McPherson and Son. Her husband, the testator, was the brother of the wife of his executor, the defendant, Phineas Janney. Abijah Janney, mentioned in these transactions, was the partner of the testator in the firm of Abijah Janney & Co., the other partner being Peter Saunders, also mentioned in the transactions. John McPherson, one of the executors, was the father-in-law, and the other executor, David Lupton, was the father of the testator. John McPherson, David Lupton, and Phineas Janney, all qualified as executors ; but as Phineas Janney was the only one of them who resided in this district, the other two seem to have left the whole management of the estate to him. The testator died in the last week in November, 1814. The greater part of his personal estate consisted of about 1200 barrels of flour, which, in consequence of the interruption of commerce by the war, was appraised at from \$3 to \$3.50 per barrel. In April, 1815, this flour was sold for a little more than \$4,080, at six months' credit, by the acting executor, the defendant, Phineas Janney, to John McPherson and Son, who were merchants, dealing in flour, and then in good credit. This sale must, of course, have been known to the defendant's co-executor, John McPherson, the purchaser ; and it can hardly be doubted that it was known also to the other executor, David Lupton, the father of the testator. In the defendant's letter to John McPherson, dated 12 mo. 21, 1816, principally upon another subject, a copy of which is annexed to the defendant's letter to David Lupton, dated 12 mo. 30, 1816, he mentions incidentally, and as a matter well known, " the amount of the flour sold John McPherson & Son, yet unpaid for," and says, " perhaps some arrangement might be made for a part of the money due for the flour, to be secured to the widow for what may be coming to her on settlement of the estate."

It may also be fairly inferred from the evidence, that the plaintiff, who is the residuary legatee, knew and approved the sale of the flour to her father and brother. The defendant, in his letter to her, dated 12 mo. 29, 1816, refers her to his letter to her father inclosing the letter to John McPherson, in which he speaks of the flour sold to John McPherson & Son, then remaining unpaid for, as a matter already well known, and says : " I wish thee most particularly to see the whole letter, in order that thee may know how the business stands." And again, he says : " In consequence of the will of D. Lupton not stating expressly whether the sale of his personal and real estate should be at public or pri-

vate sale, I would thank thee to sign the inclosed certificate or memorandum, authorizing us to sell either at public or private, as the judge of the Orphans' Court says he would prefer having it for his authority." It is admitted that this certificate was antedated so as to cover the sale of the flour, and was signed by the plaintiff, (who was then living with her father, John McPherson, in Jefferson county, in Virginia,) and returned to the defendant. This authority, thus antedated and signed by her with a full knowledge of the sale, and that the money was yet unpaid, justifies an inference that the sale of the flour was originally made to her father and brother, with her knowledge and consent, or that she afterwards assented to it. In either case it is now unconscientious in her, after they have become insolvent, to attempt to throw the loss upon the defendant because he did not pursue her father and brother with the utmost rigor of the law. Whatever right the creditors might have had to charge the defendant at law with that loss, we think that the plaintiff, under the circumstances of the case, cannot so charge him in equity, with a good conscience.

But there are several other charges in the bill.

The first is, that the defendant's commissions were increased thirty-five dollars and twenty-eight cents by unnecessary cross-entries in the accounts settled by the Orphans' Court. The bill does not explain this charge by reference to the particular cross-entries alluded to; but it is supposed that it refers to a cross-entry of sixty-four dollars credited to the estate for the testator's interest in a carriage sold to Peter Saunders, one half of which carriage he owned before, the value of which interest was allowed by Peter Saunders in the settlement of his claim against the estate of the testator. But it appeared that he (Saunders) had paid for repairs upon the carriage, which reduced the value of the testator's interest to fifty-two dollars; so that the error is in having charged commissions on sixty-four dollars instead of fifty-two dollars; the difference being ninety cents. The other cross-entry is in crediting the estate with four hundred and six dollars and fifty cents, being the amount of goods taken by the plaintiff at the inventory prices, and charging the estate with the same amount advanced to her on account of her residuary legacy. This charge against the estate ought not regularly to have been made in the account settled in the Orphans' Court; and the creditors might object to it at law, but this plaintiff, who has received the amount, cannot, in equity.

The next charge is, that the defendant paid money to Peter Saunders, without having sufficient evidence that the estate was indebted to him. If the debt was in fact due to him, it is immaterial whether the defendant had or had not sufficient evidence of

it at the time of payment. If the bill is to be understood as charging the defendant with having paid money not due, the answer denies it positively, and avers that the said Peter Saunders was a fair and *bonâ fide* creditor of the estate to the amount of the payments made to him by the defendant, after deducting the fifty-two dollars for the carriage, and one thousand dollars for the note of John McPherson & Son indorsed by him, and all other credits. The answer, in this respect, being responsive to the bill, must be taken to be true, and removes the whole ground of this charge.

The next is, that the defendant neglected to collect the money due upon John McPherson & Son's note for \$263.50.

It appears by the evidence, that at the time this note was given or when it was delivered to the defendant, by Abijah Janney & Co., of which firm the testator was a partner, John McPherson & Son were insolvent; and the defendant, in his answer, avers that he did not think himself warranted in incurring the expenses of a suit upon it.

The same may be said of Thomas Neil's note for \$223, and of the open and disputed account, against John McPherson & Son, for \$140.

The next charge is for not accounting for eleven and a quarter tons of plaster. This item is founded upon a paper, in the handwriting of the defendant, produced in evidence by the plaintiff, purporting to be a statement of the funds to meet the judgment in favor of the Bank of Alexandria; one item of which statement is, "eleven and a quarter tons plaster, due from John McPherson & Son, at twenty dollars per ton, amount of appraisement, two hundred and twenty-five dollars." The paper shows that the plaster was not on hand, but was a debt due, by John McPherson & Son, in plaster. It rested, therefore, upon the same ground as the balance due upon the sale of the flour, and the open account; and John McPherson & Son denied that any thing was due, beyond the one thousand dollars for which they gave their note, with Peter Saunders's indorsement, and which was paid by him in the settlement of his claim against the estate. The fact of the insolvency of John McPherson & Son being proved, it was a matter within the discretion of the defendant, as executor, whether he should incur the expenses of a suit against them.

The next charge is, that the defendant had not accounted with the County Court of Fairfax county, in Virginia, for the property received by him in that county.

This charge is positively denied in the answer, and appears to have been abandoned in the argument.

The defendant, in his answer to the supplemental bill, relies

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upon the lapse of time as a bar to the opening of the accounts, at this time, his final account having been settled with the Orphans' Court in January, 1821, and the plaintiff's bill not having been filed until May, 1833, a period of more than twelve years, and more than eighteen after the sale of the flour.

We are of opinion, however, that the mere lapse of time is not, alone, a bar to the opening of an executor's account. But the long acquiescence of the plaintiff in the settlement of the accounts, is material to the question, whether the plaintiff can, with a good conscience, now come into a court of equity to charge the defendant with the losses mentioned in the bill. This, with the other circumstances already noticed, does affect the conscience of the plaintiff, and renders it proper that this Court, as a court of equity, should refuse her its aid.

The bill must be dismissed with costs.

Affirmed by the Supreme Court of the United States, (13 Peters, 381,) upon the ground that the lapse of time was a bar to the relief sought.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1838, AT WASHINGTON.

UNITED STATES *v.* W. S. SMITH.

A certificate, in the usual form, by the officers of the Treasury of the United States, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail.

THE United States had filed an account from the Treasury, certified in the manner required by the statute, stating merely a balance of \$11,000 due by the defendant.

Mr. W. L. Brent, for the defendant, moved for leave to appear without special bail; and stated that this Court had decided that a mere statement from the Treasury, of a balance due, was not even *primâ facie* evidence on the trial, and, therefore, is not sufficient to hold the defendant to bail.

The COURT (CRANCH, C. J., not sitting in the case,) permitted the defendant to appear without special bail.

MICHAEL HILL *v.* JOHN MYERS.

The affidavit to hold to bail must show that the debt was due at the time of issuing the *capias*.

THE affidavit, made after the return of the writ, stated that the debt was "now" due, and did not state that any thing was due at the time of issuing the *capias*.

The COURT, at the motion of *Mr. W. L. Brent*, permitted him to appear for the defendant without special bail. (MORSELL, J., absent.)

 Smith v. Arden's Heirs.

CAROLINE H. SANDERSON v. JOHN H. SERAT.

In actions on the case for uncertain damages, the Court will mitigate the bail, according to circumstances.

CASE, for breach of promise of marriage; damages laid at \$10,000. The plaintiff made affidavit that she had sustained damages to that amount.

The COURT, after examining into the circumstances of the defendant, required the bail to justify only to the amount of \$1,000.

 BANK OF THE UNITED STATES v. DAVID PETER'S HEIRS.

The only cases in which the Court has permitted the heirs of a deceased debtor to have the rents and profits until the sale of real estate sold to pay the debts of the ancestor, are cases of sale under the Act of Maryland for deficiency of personal assets.

Mr. Marbury, for the defendants, the heirs of David Peter, moved the Court to order the interest of the proceeds of the sales of the lands and lots to be paid to the heirs, because if they had not been sold, they would have been entitled to receive the rents and profits until a sale under the will of David Peter. There had been an agreement that the property should be sold, and the proceeds stand in the place of the land; but no reservation was made of the interest for the benefit of the heirs.

The COURT, however, (THRUSTON, J., absent,) refused; and said, the only cases in which the Court had permitted the heirs to have the rents and profits until sale, were cases of sale under the Act of Assembly of Maryland, of 1785, c. 72, for deficiency of personal assets.

 CLEMENT SMITH v. ARDEN'S HEIRS.

A sub-purchaser, who gets in the paramount title, is bound in equity to fulfil his contract with the first purchaser, deducting what he has been obliged to pay to get in the title.

The first purchaser of several lots having given his several notes for each lot respectively, with the same indorser, and the lots having been resold for his default, some of the lots bringing more, and some less than the first contract price, it was held that the indorser was entitled to the benefit of the surplus of one to make good the deficiency of the others.

UPON a motion for ratification of a sale which had been made under a decree in this cause, and for disposition of the proceeds

of the sale, the facts, by the statement of the parties, appeared to be these :

Certain lots in the city of Washington, had been sold under a deed of trust from D. C. Mr. Arden became the purchaser, and gave a separate note for each lot, with J. C. R. as his indorser. Arden sold a lot to Hill, who sold it to Mr. Coyle. Arden's note, given for the lot, was assigned to the complainant, Clement Smith ; Arden failed to pay Smith ; Hill failed to pay Arden, and Coyle failed to pay Hill. The lot was resold by the trustee of D. C., and at that sale Coyle became the purchaser, with notice of the sale by Arden to Hill, and of Hill's delinquency.

On the 28th December, 1838, the COURT (MORSELL, J., doubting,) decided that Coyle, standing in the place of Hill, with notice, must pay the purchase-money due from Hill to Arden, deducting what Coyle has paid, or is to pay to get in the legal title. And as some of the lots sold for more, and some for less than the respective notes given by Arden therefor,

The COURT (CRANCH, C. J., not giving any opinion upon that point,) decided that the indorser of Arden's notes was entitled to the benefit of the surplus of one to make good the deficiency of the others.



SAMUEL S. BROOK & JOHN C. EDRINGTON v. JOHN BROWN, Special Bail of C. F. LE BARRON.

A discharge, under the insolvent law of the District of Columbia, does not operate against a non-resident creditor, unless he is the creditor at whose instance the debtor is confined at the time of the discharge.

A non-resident creditor does not, by bringing an action against his debtor in the District of Columbia, cease, in law, to be "a creditor residing without the limits of the District of Columbia," nor does he thereby waive the benefit given to non-resident creditors by the Act of Congress of the 6th of May, 1822.

A debtor who is out on bail, is not in confinement at the instance of his creditor, within the meaning of the Act of the 6th of May, 1822.

"Confinement," within the meaning of that act, is actual confinement in jail, or in the prison-bounds, at the time of the debtor's discharge under the insolvent act.

SCIRE FACIAS, issued 5th February, 1838, returnable to March term, 1838.

Mr. Bradley, for the bail, moved to enter an *exoneretur* on the bail piece, upon payment of the costs of the *scire facias*, because the principal was discharged under the insolvent act of the District of Columbia, on the 4th Monday of November, 1834.

At March term, 1833, Brown became special bail of LeBarron, in the Circuit Court of the District of Columbia, for the county of Washington.

At November term, 1833, there was judgment by default against LeBarron, who, being in commitment at the suit of other creditors, was discharged under the insolvent act on the 4th Monday of November, 1834, as before stated.

At March term, 1837, final judgment was entered up against LeBarron for \$176.35, with interest from the 11th of December, 1832, until paid, and \$21.01 costs.

Mr. Dermott, contrà, for the plaintiff, objected that the plaintiff was not a resident of the District of Columbia, at the time of the discharge of the defendant Le Barron, who was not then confined at the instance of the plaintiff, but was at large on bail.

The Act of Congress of the 6th of May, 1822, [3 Stat. at Large, 682,] entitled "An Act for the relief of certain insolvent debtors," has this proviso, "That no discharge under this act, or the act to which it is amendatory, shall operate against any creditor residing without the limits of the District of Columbia, except the creditor at whose instance the debtor may be confined."

Mr. Bradley, in reply, contended that the defendant, having been arrested, and in the custody of his bail, was thereby confined at the instance of the plaintiff, and therefore his discharge operated against this creditor, as well as against the resident creditors.

And further, that the plaintiff, by bringing suit in the District of Columbia, has submitted himself to the jurisdiction of the laws in force here, and cannot be considered as residing out of the limits of the district, within the meaning of the Act of the 6th of May, 1822; and upon this last point he cited the case of *Clay v. Smith*, 3 Peters, 411; *Petersdorff on Bail*, 490, and *Ogden v. Saunders*, 12 Wheat. 364.

Where the principal would be entitled to an immediate discharge, if surrendered, the bail are entitled to relief by an *exoneretur* without a surrender. *Beers v. Haughton*, 9 Peters, 330, 355, 358.

Mr. Dermott, contrà, cited *Harrison & Sterrett v. Boyd*, (4 Cranch, C. C. 190,) and *Cook v. Fenton*, (Id. 200,) in this Court, at May term, 1832.

CRANCH, C. J., after stating the case, as above, delivered the opinion of the Court, (*MORSELL, J., contrà*.)

If Mr. LeBarron would have been entitled to an immediate discharge if he had been surrendered, or, if now surrendered, would be entitled to a discharge, the bail, according to the case of *Beers v. Haughton*, would be entitled to relief by *exoneretur*. And if his discharge under the insolvent law in November, 1834, operated against the plaintiff, the defendant Le Barron would now be

entitled to an immediate discharge from imprisonment, if surrendered.

It is admitted that the plaintiff was, in fact, residing out of the limits of the District of Columbia at the time of Le Barron's discharge under the insolvent law, so that the discharge did not operate against the plaintiff, unless he was "the creditor at whose instance the debtor" (Le Barron,) "was confined;" or, unless the plaintiff, by bringing his suit against the debtor, in the District of Columbia, ceased, in law, to be a creditor "residing without the limits of the District of Columbia;" or waived the benefit given by the Act of May 6, 1822, to non-resident creditors.

Three questions, therefore, arise in this case:

1. Was the plaintiff "the creditor at whose instance the debtor was confined" at the time of his discharge under the insolvent law?

2. Did the plaintiff, by bringing his suit in this district, cease in law, to be a creditor residing without the limits of the District of Columbia?

3. Did the plaintiff, by bringing his suit here, waive the benefit given to non-resident creditors by the Act of May 6, 1822?

Some cases have heretofore come before the Court, in which this subject has been brought into view.

In the case of *Lee v. Gamble*, at December term, 1828, (3 Cranch, C. C. 374,) the defendant, at the return of the *capias ad respondendum*, was brought in by the marshal and permitted to appear without special bail, having been discharged under the insolvent act in the year 1818, after the debt accrued, but before the act of 1822.

In *Harrison v. Gales*, special bail of Gilbert C. Russell, (3 Cranch, C. C. 376,) at the same term, the plaintiff was a citizen of Alabama. Russell, the debtor, had been discharged under the insolvent law of Alabama, and also under that of this district; but at the time of his discharge here, he was not confined at the instance of that creditor. The bail produced a copy of the law of Alabama and of the proceedings under it, and this Court ordered an *exoneration* on the bail piece, on the ground of the discharge in Alabama.

In *Farrow v. Brown*, special bail of Russell, at the same term, Mr. Wallach moved the Court to discharge the bail upon the ground that the principal had been discharged, both by the laws of Alabama, and of this district.

Mr. Key, for the plaintiff, made various objections to the discharge under the laws of Alabama, and to the authentication of the proceedings; and as to the discharge in this district, he contended that the plaintiff was not bound by it because he was a person residing in Virginia at the time of the debtor's discharge, and that the debtor was not then confined at his instance, having

given special bail, and the judgment having been rendered before his discharge.

Mr. Wallach contended, that as the plaintiff had brought his suit here he was not within the intent and spirit of the act, for this purpose, to be considered as a creditor residing without the limits of the district; and cited *Ogden v. Saunders*, 12 Wheat. 364.

Upon the first hearing of the motion, the COURT, (CRANCH, C. J., *contra*,) was of opinion that the bail should be discharged. THURSTON, J., on the ground of the discharge in Alabama, and MORSELL, J., because the plaintiff having obtained a judgment in this Court against his debtor, was not to be considered as a creditor residing without the limits of the district. But on the next day, Mr. Key objected to the *exoneretur* because two of the judges were of opinion that the bail could not be discharged by reason of the debtor's discharge under the insolvent law of this district, and two were of opinion that the record of the discharge in Alabama was not sufficiently authenticated. The Court, therefore, agreed to consider the case again, and requested the counsel to furnish the Court with information as to the decisions of the courts of Alabama upon the construction of the law of that State.

At December term, 1829, the COURT overruled the motion for the *exoneretur*, and awarded execution against the bail; thus, in effect, deciding, that custody of the bail is not confinement; and that the plaintiff, by bringing suit here, does not cease to be "a creditor residing without the limits" of this district.

The next case upon this subject was that of *Harrison and Sterrett v. Dan. Boyd*, at May term, 1832, (4 Cranch, C. C. 190.) The defendant had been arrested on a *capias ad respondendum*, returnable to that term, and had given an appearance bond to the marshal. On the 7th of May, 1832, the first day of the term, he was discharged under the insolvent law of this district, and Mr. R. S. Coxe offered to appear for him without special bail.

Mr. C. Cox, for the plaintiffs, objected that the plaintiffs were residing without the limits of the District of Columbia at the time of the discharge, and therefore not bound by it; and cited *Harrison v. Gales*, special bail of Russell, and *Farrow v. Brown*, special bail of Russell, above mentioned.

Mr. R. S. Coxe, cited *Clay v. Smith*, 3 Peters, 411; *Ogden v. Saunders*, 12 Wheat. 362, 363, 364; and *Shaw v. Robbins*, cited in a note to *Ogden v. Saunders*, in p. 369; and contended that a non-resident creditor, by making use of our Court to compel payment, had made himself a resident *quoad hoc*; and that the defendant having given a bail-bond to the marshal, was thereby in confinement at the instance of the plaintiffs.

But the COURT, (THRUSTON, J., absent,) being divided in opinion, the motion to appear without special bail did not succeed. CRANCH, C. J., being of opinion that the plaintiffs, by bringing suit here, had not made themselves residents *pro hac vice*; and that the defendant could not be considered as confined at the instance of the plaintiffs after he had given an appearance bail-bond to the marshal, and had been discharged from custody. MORSELL, J., thought that by bringing suit here, the plaintiffs were, for this purpose, to be considered as not residing without the limits of this district.

The last case on this subject is *Cooke v. Fenton*, also at May term, 1832, (4 Cranch, C. C. 200.)

Judgment had been rendered against the defendant on the 20th of December, 1831, and he was discharged under the insolvent law of this district in January, 1832.

Mr. Redin moved for an *exoneretur* of the bail, on the ground of Fenton's discharge, although the plaintiff was a creditor residing without the limits of the District of Columbia at the time of the discharge, and the defendant was not then confined at the instance of the plaintiff, having given special bail; and contended that the Act of May 6, 1822, restricting the operation of the discharge was applicable only to non-resident debtors; the legislature intending only to prevent debtors from the States coming into this district and getting discharged from personal liability for their debts. But the Court overruled the motion and the bail was not discharged; thereby, in effect, deciding, that the proviso of the Act of 1822 was applicable to resident as well as non-resident debtors; and that the debtor cannot be considered as confined by the plaintiff after he has given special bail and been discharged from the custody of the marshal.

These cases, however, do not seem to have settled the law definitively upon this subject, and the questions may still be considered as open for argument.

1. The question then is, whether the plaintiff in this cause is the creditor at whose instance the debtor was confined, within the meaning of the Act of May 6, 1822.

This question may be subdivided. 1. What sort of confinement does the act contemplate? 2. When must the debtor be confined, and how long?

1st. It is reasonable to suppose that the confinement contemplated by the legislature in the Act of 1822, was a confinement from which the debtor could be relieved under the insolvent act; and which, by the words of that act, is "actual confinement in jail;" or according to the construction which has been given to the act, confinement within the prison-bounds. No person is entitled to the benefit of the act, who is at large upon bail.

The discharge, therefore, will not operate against a non-resident creditor unless the debtor was confined, at the instance of the plaintiff, by actual confinement in the jail, or in the prison-bounds.

2d. When must the debtor be confined, and how long? The first answer, which occurs to this question, is, that the debtor must be in confinement at the time of the discharge of the debtor, otherwise there would be nothing for the order of discharge to operate upon, in case the plaintiff should be the only creditor; and if between the day of the application of the debtor for the benefit of the act, and the day appointed for his discharge, his creditor should discharge him from his confinement, the judge would not proceed further in the business, as all further proceeding would be nugatory. But if the debtor should be confined at the instance of other creditors, and not at the instance of the plaintiff, and the judge should proceed to discharge the debtor, such discharge is, by the Act of 1822, prevented from operating against the plaintiff; because the debtor was not confined at his instance.

2d. The next question is, whether the plaintiff, by bringing suit in this district, ceased to be a creditor residing without the limits of the District of Columbia?

If Congress, in the Act of May 6th, 1822, [3 Stat. at Large, 682,] after providing that no discharge should operate against non-resident creditors, had intended to except all non-resident creditors who should bring their suits in the district, they would probably have said so, and not have limited their exception to the non-resident creditors at whose instance the debtor should be confined. They might well say to non-resident creditors, you may bring your suits against your debtors in the District of Columbia and their discharge under the insolvent law of that district shall not operate against you, unless you confine them; but if you confine them they may be discharged from your confinement, and such discharge shall operate against you as well as against resident creditors. And I think Congress has in effect said so, and did not intend to put all creditor-plaintiffs in our courts on the same footing as to discharges under the insolvent act.

As to the time of confinement; it is not material how long the debtor has been confined at the instance of the plaintiff, if he be so at the time of his discharge.

3d. The third question is, whether plaintiff, by bringing his suit here, waived the benefit of the proviso of the Act of May 6th, 1822, in favor of non-resident creditors?

I think he did not. The act has authorized him to bring suit here against his debtor, without being affected by his discharge

under the Insolvent Act, unless that discharge be from confinement at the instance of the plaintiff.

The case of *Clay v. Smith*, 3 Peters, 411, has been relied upon to show that, by bringing suit in the District of Columbia, the plaintiff is to be considered as a resident creditor. But in that case the plaintiff received a dividend of the bankrupt's estate in Louisiana, and was, therefore, bound by his discharge, although as a citizen of Kentucky he would not have been bound by it if he had not made himself a party to those proceedings; that is, the proceedings under the bankrupt law of Louisiana. That case, therefore, is not applicable to the present, where the rights of the parties seem to me to be clearly ascertained by the act itself.

In *Ogden v. Saunders*, the extra-territorial operation of a discharge under a bankrupt law is denied, unless plaintiff and defendant were subject to the jurisdiction of the State under whose laws the discharge was obtained.

Upon the whole, I am of opinion that inasmuch as LeBarron was not, at the time of his discharge, confined at the instance of these plaintiffs, who were non-resident creditors, he could not, if now surrendered, avail himself of his discharge as against them; and, therefore, the bail ought not to be exonerated.

In the case of *Clarke v. Hempstone*, at this term, in which *Mr. Giberson* has moved to enter an appearance for the defendant without special bail, on the ground of his discharge under the insolvent act, the defendant had given an appearance bail-bond to the marshal, and was not in confinement at the instance of the plaintiff at the time of his discharge. I am of the same opinion, and that the defendant cannot be permitted to appear without special bail.

THRUSTON, J., concurred. MORSELL, J., dissented.

Motion overruled in both cases.

CLEMENT B. WESTON, Plaintiff in Error, v. UNITED STATES,
Defendant in Error.

It is error in the judge to instruct the jury that certain facts constitute larceny, unless the *animus furandi* be expressly stated as one of those facts; and unless the fact be also stated that the goods were taken without the consent of the owner.

ERROR from the Criminal Court of the District of Columbia.

The prisoner was indicted for stealing twenty-six silver coins of the value of fifty cents each, sixteen silver coins of the value of twenty-five cents each, and nine silver coins of the value of one dollar each, of the goods and chattels of one Sophia Brasey.

Upon the trial the Attorney for the United States, prayed the following instruction, namely :

" If the prisoner is believed, by the jury, to have come into the witness's house and found her counting money ; and that he then conceived the intention to obtain the money under a fraudulent and false pretence of changing it for her into gold, meaning at the time to appropriate it to himself under this pretence ; and that, having falsely stated himself to be a clerk in the post-office, of the name of Wilson, he thereupon, in pursuance of his said intention, talked and acted, in relation of the said money, so as to induce the witness to believe that he had the gold about him, and would then give her the gold for the money ; and thereupon the witness being so induced to believe that the prisoner was about to give her gold, in exchange for her money, allowed him to take the money from the table and put it into his pocket ; and that after he had so taken it up and put it into his pocket, he said he would go and bring her the gold, and was permitted by her to go away with it, upon his promise to return and bring her the gold ; then the taking up and pocketing the money, under the circumstances of the case above stated, if believed by the jury to be true, with the intent and in the manner above stated, is larceny."

Whereupon, the defendant's counsel prayed the Court that the following addition be made to said instruction, if given, namely :

" But should the jury believe, from the evidence, that the prosecutrix proposed to the defendant to take the money and get gold for it, and that he said he would try to do it, but as gold was hard to be got, or words to that effect, he did not know if he could, and that said money was delivered to him for that purpose, with the consent of the prosecutrix, notwithstanding the defendant may not have returned the money so proposed to be changed, it is not larceny, and the defendant is entitled to a verdict of acquittal."

The instruction, with the addition, as prayed, was given by the judge, and the defendant's counsel took a bill of exceptions, upon which the cause was brought up to this Court by writ of error.

Two objections were made to the instruction granted at the prayer of the District Attorney.

1. That it does not require the jury to find that the money was taken *animo furandi*, or feloniously.

2. That the facts stated in the prayer, do not show that the taking was without the consent of the owner of the money, or, as the books say, "*invito domino*."

Mr. R. J. Brent and *Mr. Carlisle*, for the defendant, cited 2 Russell, 93, 107, 108, 109, 110, 112, 114, 117, 122, 135, 187 ;

Roscoe, 487, 491; *Rex v. Walsh*, 4 Taunt. 281; Dane's Ab. 164, 187; *Perl's case*, in this Court, at March term, 1838; *Rex v. Pratley*, 5 Carr. & Payne, 533; *Six Carpenters' case*, 8 Coke, 290; 1 Russell, C. M. 52; *Young v. Rex*, 3 T. R. 98.

Mr. Key, for the United States, *contra*, cited 2 Russell, 118, &c.; 2 Chit. Bl. 108, note. See, also, 2 Russell, 113; *Phineas Adams's case*.

CRANCH, C. J., after stating the case, delivered the opinion of the Court, (THRUSTON, J., dissenting.)

The facts stated in a bill of exceptions are to be considered by the Court exactly as if they had been found in a special verdict; for the Court tells the jury what the law is upon the facts to be found by them; and the only difference is, that if a special verdict be found, the Court decides the law after the facts are ascertained by the jury; and in giving an instruction at the trial, the Court decides the law before the facts are found. And the Court, in giving an instruction, can no more infer any fact not expressly stated in the prayer, than they can infer any fact not expressly found in a special verdict.

A court cannot instruct a jury that certain facts constitute a certain offence, unless every essential fact necessary to constitute the offence be included in the statement. And every instruction given to the jury upon an hypothetical statement of facts, must be as strictly justified by the hypothesis, as an opinion given upon a special verdict must be by the facts found by the jury; and in neither case can the court infer any fact from the facts stated, or found. Every fact to be inferred from facts stated, must be expressly found or stated.

There is no definition of larceny, to be found in the books, which does not include the fact of a felonious intent, or the *animus furandi*, as an ingredient necessary to constitute the offence. No other intent can be substituted. An "intention to obtain money under a fraudulent and false pretence," "meaning at the time to appropriate it to himself under this pretence," is evidence from which the jury may, when connected with other circumstances, infer the *animus furandi*, but it is not the *animus furandi* itself. There may be a fraudulent intent to obtain money, which may not be a felonious intent. So there may be a taking of money by a man, with intention to obtain it under a fraudulent and false pretence, and to appropriate it to himself under that pretence, which might not be a felonious taking, or a taking *animo furandi*. An instruction that such a case is larceny, without finding the felonious intent, or the intent to steal, is not perfectly correct in law.

There is a great difference between an instruction to the jury,

and a demurrer to evidence. In the latter case the question is, whether the evidence, with the aid of all the inferences which the jury may lawfully make from the facts proved, is sufficient to justify the jury in finding the defendant guilty. The same question arises upon a motion for a new trial on the ground that the verdict is against evidence.

In such cases, the judges have been in the habit of saying that such and such facts amount to larceny; when it is evidently their meaning, that the convictions were right, that is, justified by the evidence; or, in other words, that the evidence was sufficient to justify the jury in convicting the prisoner, because it justified them in finding the *animus furandi*.

It is in this way that all the English cases which have been so profusely cited, came before the courts. In all of them the question was, whether the jury could in law, find the prisoner guilty, upon the evidence stated as in a demurrer to evidence; and, of course, leaving the jury to draw all the inferences which they could lawfully draw from the facts given in evidence; and in almost every one of them the jury was left to find the felonious intent.

Not one of them was upon a bill of exceptions taken to an instruction to the jury by the court upon an hypothetical state of facts. In some of them the judges were of opinion that the facts stated justified the jury in finding the felonious intent, and, consequently, in finding the prisoners guilty.

The English cases, therefore, do not apply to this part of the case now before this Court; which is not upon a demurrer to the evidence, nor on a motion for a new trial; but is upon a bill of exceptions to an instruction given by the judge, that certain facts, *per se*, are larceny, without finding a felonious intent, or the *animus furandi*; instead of instructing the jury that the facts stated were evidence from which the jury might infer that the original taking of the money by the prisoner was with the felonious intent to steal it, and that if they should so find, they might find him guilty of larceny, as charged in the indictment.

Upon this bill of exceptions, the question is not whether the evidence was sufficient to justify the general verdict of guilty. If such were the question, I should think there was no error as to that part of the instruction to which the defendant has excepted, for which we could reverse the judgment. But as the judge did not make it a condition of the instruction that the jury should find the felonious intent, or the *animus furandi*, we think there is error, in the instruction, for which the judgment should be reversed and a *venire de novo* awarded.

2. The second objection to the instruction is, that the facts

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stated in that part of it to which the defendant excepted, do not show that the taking of the money was without the consent of the owner.

Before the judge could correctly instruct the jury that the case stated constituted larceny, we think he should have inserted a condition that the jury should find from the evidence that the defendant took the money without the consent of the owner. The finding of facts from which that inference might be drawn, is not a sufficient finding to constitute the case stated, *per se*, larceny.

Judgment reversed, and *venire de novo* awarded.

JAMES MOODY VAUGHAN and others v. HENRY NORTHOP, administrator of James Moody and others.

An administrator appointed in Kentucky, who has received, in the District of Columbia, money belonging to the estate of his intestate, cannot by a bill in equity be compelled to account for and distribute the same to the next of kin, citizens of, and residing in Virginia, although the administrator should be found in the District of Columbia.

Quære, whether a foreign administrator can be sued, as such, and held to account in the District of Columbia, for assets there received.

THE bill in equity in this cause, stated that the plaintiffs, all of Virginia, are the lawful and only children of Catharine Moody, deceased, who intermarried with their father, and who was the only child, next of kin, and heir of James Moody, who, in 1802, died intestate in Fayette county in Kentucky; and that the plaintiffs are his only next of kin and legal heirs and distributees, and that he left no widow. That the defendant Henry Northop, obtained letters of administration of his estate in Kentucky, and received assets more than sufficient to pay all his debts and funeral expenses, &c. and particularly, that he received, in the District of Columbia, at least \$5,200 from the United States, under the Act of Congress of July 5, 1832, (4 Stat. at Large, 563,) for military services of the said James Moody, in the Revolutionary War, in the naval or military service of the State of Virginia, and that the plaintiffs, by the said Act of Congress, are entitled to receive the same, as next of kin to the said James Moody, but the said defendant Northop refuses to account to the plaintiffs for the same; and confederating with Benjamin Moody, and twenty-one others, defendants, (naming them,) all of Kentucky, and two of Maryland, (also naming them,) denies that the plaintiffs are, but affirms that the defendants, (except Northop,) are the next of kin of the said James Moody, and that he has accounted with them therefor, and the plaintiffs charge that the claim of the defendants is fraudulent

and against conscience, and pray that an account may be taken of the personal estate of the said James Moody, which came, or ought to have come to the hands and possession of the defendant Northop, as administrator, and of the debts, funeral expenses, &c. and that the residue, after paying all legal charges and just debts, may be ascertained and distributed among all the plaintiffs as next of kin of the said intestate.

The defendant Northop, in his answer, excepts to the jurisdiction of the Court, and prays that his exception may avail him as if he had demurred to the same; and the cause was heard as upon demurrer, and argued by *Mr. R. S. Coxe*, for the defendant, and *Mr. R. J. Brent*, for the plaintiffs. *Mr. Coxe*, for the defendant, contended that a foreign administrator cannot be compelled to account here. Neither the laws of Kentucky, nor the laws of the District of Columbia, can be carried into effect here, against a Kentucky administrator. He has given his bond to account there, and there only. The Act of Congress of the 24th June, 1812, § 11, (2 Stat. at Large, 755,) which enables administrators appointed in the States and territories of the United States to sue here, does not oblige foreign administrators to account here; and no suit can be maintained against them here as administrators. Chancellor Kent has decided that the courts of New York cannot hold jurisdiction against a foreign executor or administrator. *Morsell v. Dickey*, 1 Johns. Ch. R. 153; *Doolittle v. Lewis*, 7 Johns. Ch. R. 45; *Sears v. Femwick*, 1 Cranch, 259; *Champlin v. Tilley*, 3 Day, 303; Story's Conflict of Laws, 422, § 513, 514.

Mr. R. J. Brent, for the plaintiffs. The administrator is liable in Kentucky, for assets received there only. He is liable to account here for assets received here. *Bryan v. McGee*, administrator, Coxe, Dig. 16, § 54; S. C., 2 Wash. C. C. R. 337; *Penn v. Lord Baltimore*, referred to in *Lee v. Carroll*, 3 Gill. & Johnson, 509; *Freeman v. Fairlee*, 3 Meriv. 24, 45; 8 Com. Dig; *Sanderlands v. Hinnis*, 3 Simon, 263; Story's Conflict of Laws, 515; Story's Equity, 505, 507; 4 Ves. 73.

A trustee is liable to account wherever found. *Massie v. Watts*, 6 Cranch, 148.

The Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] gives this Court jurisdiction in all cases where either of the parties is found here.

Mr. Coxe, in reply. This Court has not jurisdiction of every case in which one of the parties is found here; but it is necessary to the jurisdiction of this Court, that one of the parties should be found here. It is a limitation, not an extension of the jurisdiction. The India cases do not apply. Where there are *bona nota*-

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bilia in divers diocesses, administration must be obtained from the provincial prerogative court, but they are all under one allegiance, and one jurisdiction. Godolphin, 71; *Trecothick v. Austin*, 4 Mason, 32.

The money must be remitted to Kentucky, to be administered there. *Pratt v. Northam*, 5 Mason, 103, 104; *Harvey v. Richards*, 1 Mason, 381.

The COURT, (*nem. con.*) was of opinion, that as the defendant's intestate died in Kentucky, and the defendant's letters of administration were granted in Kentucky; as the complainants resided in Virginia, and all the defendants in Kentucky, this Court had not, or if it had, ought not to assume jurisdiction in this case, although the administrator received the money here in 1833, and was found here in 1837.

Bill dismissed with costs.

 ROBBINS & MCKNIGHT v. UPTON.

In a question of bail, the Court will not take into consideration a set-off claimed by the defendant. In a suit upon protested bills of exchange, the Court will not require an affidavit of the amount due upon the bills, in order to hold the defendant to special bail.

It seems to be no objection to bail, that he is indorser of the paper upon which the suit is brought.

ASSUMPSIT upon protested bills of exchange drawn by the defendant.

Mr. Bradley, for the defendant, offered to show a set-off, by way of mitigating the amount for which the bail should justify.

The COURT, (*nem. con.*) refused to consider the set-off.

Mr. Bradley then contended, that the plaintiff must make affidavit of the amount due upon the protested bills.

The COURT and bar said that it was never required by the practice of this Court.

Mr. Bradley contended that it was no objection to bail, that he was indorser upon the bills, and cited *Petersdorf on Bail*, 281.

To this the Court seemed to assent.

 CORPORATION OF WASHINGTON, Appellant, v. JOHN LYNCH, Appellee.

The Corporation of Washington, under its authority to prevent nuisances, may prohibit the keeping of a dog in the city without a license, and may require money to be paid for the license.

Corporation of Washington v. Lynch.

A warrant is too vague and uncertain which charges that the defendant "did on or about the 20th of July inst., own, harbor, or keep a female of the dog kind in Washington City, in the county aforesaid, without having a license therefor, contrary to the act or acts of the mayor, &c. on that subject made and provided.

APPEAL from the judgment of a justice of the peace, who *non-pros'd* the corporation, upon a warrant for a penalty of \$20, "for that he, the said John Lynch, did, on or about the 20th of July instant, own, harbor, or keep a female of the dog kind in Washington City, in the county aforesaid, without having a license therefor, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

This prosecution is supposed to have been founded upon the by-law of the Corporation of Washington, approved April 1, 1820, entitled "An Act imposing an annual tax on dogs, and for other purposes, and repealing all other acts on that subject;" by the first section of which it is enacted, "that a tax shall be levied and collected, of one dollar each per annum, on all male animals of the dog kind; and of five dollars each, per annum, on all female animals of the dog kind, to be paid by the owners thereof, respectively, into the hands of the register for the use of the corporation."

And by the second section it is enacted, "that it shall be the duty of every person residing in the city of Washington, and owning or possessing any animal of the dog kind, to enter such with the register, on or before the first day of January, annually, and to pay the tax hereby imposed; and it shall be the duty of the register to make regular entries, describing the dog or dogs so entered, and to give a license to such person or persons, on payment of the tax; which license shall authorize him, her, or them, to keep such dog or dogs until the first day of January in the ensuing year; and any person or persons who shall own, possess, harbor, or conceal any animal of the dog kind within the city, and shall fail to pay the tax and obtain the license as aforesaid, shall, for every such neglect or offence, forfeit and pay the sum of five dollars," (not twenty dollars, as stated in the warrant.)

Mr. Carlisle, for the appellee, contended that the corporation has no power to tax dogs, because they are not property, as this Court has decided in the case of _____ at _____ and as the judge of the Criminal Court also decided, at the last term of that court in this county. By the charter of 1820, the corporation has power only "to lay and collect taxes upon the real and personal property" within the city. It is true that it has power to "prevent and remove nuisances," but not to license them. Dogs are not in the list of things which, by the charter, the corporation may "license, tax, and regulate."

Corporation of Washington v. Casanave.

The corporation has no power to require a penalty for not paying the tax ; they have only power to lay and collect the tax.

But there must be a judgment of conviction before they can recover the penalty, and the conviction must be averred in the warrant to recover the debt.

Mr. Bradley, contra. Under the power to prevent nuisances, the corporation has a right to prevent, or restrain, or regulate the keeping of dogs in the city ; for, although the keeping of a single dog may not, of itself, be a nuisance, yet the number kept may altogether amount to a nuisance ; to prevent which, the corporation may impose upon the keepers such terms and conditions, that few would be disposed to keep them ; by which means the nuisance may be prevented, while, at the same time, the corporation may obtain some revenue from the sale of the licenses.

The COURT (*nem. con.*) was of opinion, that under the power to prevent nuisances, the corporation had power to limit the number of dogs by requiring the owners to obtain license by payment of a tax. But the warrant being too vague and uncertain, the judgment was affirmed with costs.

CORPORATION OF WASHINGTON v. PETER CASANAVE.

A keeper of a wood-yard in Washington is a retailer, within the meaning of that clause in the charter which authorizes the corporation "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages," &c.

APPEAL from the judgment of a justice of the peace, rendered against the Corporation of Washington upon a warrant for the penalty of \$50, "for that he the said Peter Casanave did, on the 2d day of September, 1833, keep a wood and coal-yard in the said city of Washington, to sell and barter firewood and coal, and did sell and barter firewood and coal, at retail, in the said city, without first obtaining a license so to do, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

This prosecution was founded on the by-law of the 28th of July, 1831, entitled "An Act to provide a revenue for the canal fund," by which it is enacted, "that from and after the 1st day of August next, it shall not be lawful for any person or persons to sell or barter lumber, firewood, or coal ; to sell or barter bricks ; to sell or barter porter, ale, or beer ; to keep a livery-stable ; or to trade or traffic in slaves, within the limits of this corporation,

without first obtaining a license therefor, as hereinafter provided for, from the mayor, (who is hereby authorized to issue the same, to be and remain in force for one year ;) for each of which the following taxes shall be paid at the time of taking out the same, to wit : For a license to keep a lumber-yard, and to sell and barter firewood, \$40. For a license to keep a wood-yard, and to sell and barter firewood, \$20. For a license to keep a coal-yard, and to sell and barter coal, \$15. For a license to keep a brick-yard, and to sell and barter bricks, \$30. For a license to keep a wood and lumber-yard, to sell and barter firewood and lumber, \$50. For a license to keep a wood and coal-yard, to sell and barter firewood and coal, \$40. For a license to keep a lumber, wood, and coal-yard, to sell and barter lumber, firewood, and coal, \$60. For a license to sell or barter porter, ale, and beer, brewed within the District of Columbia, in quantities not less than one barrel, or thirty-one and an half gallons, \$50 ; and for a license to sell or barter porter, ale, and beer, not brewed in the District of Columbia, in addition to any other license obtained from this corporation, \$25. For a license to keep a livery-stable, \$20. For a license to trade or traffic in slaves for profit, whether as agent or otherwise, \$400. And every person who shall sell or barter at retail, trade, traffic, or keep, as aforesaid, without first obtaining a license therefor, shall forfeit and pay for each and every offence, a sum of not less than \$20, nor more than \$50, to be recovered and disposed of as other fines are."

Mr. Hoban, for the defendant, (the appellee,) contended that the corporation had no power, under their charter, to tax any thing but property ; not mere trades or professions, which could not be assessed ; and the taxes of which would be subject to no limit. That such taxes are derogatory to common right, and inconsistent with the general law of the land. That the by-law does not profess to be passed under the power to license retailers, for it affects wholesale dealers as well as retailers ; and a man who should sell wood or coal by wholesale, would be as much liable to the penalty, as one who should sell firewood by the foot, and coal by the peck. The keeper of a livery-stable cannot, in any sense of the word, be called a retailer ; so the trafficker in slaves, who collects them individually or in small numbers, and sells them by cargo, cannot be called a retailer, and yet he would be liable to the penalty of the by-law. The same observation applies to the licenses granted under the by-law of the 28th of October, 1831, to confectioners, and the venders of hats, boots, and shoes, hardware, perfumery, medicines, jewelry, and watches, dry goods, and china, glass, and crockery ware, the penalty is not for retailing, but for selling, whether by wholesale or retail. He

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also contended that the word "retailers" in the charter, applied only to retailers of spirituous liquors.

Mr. Bradley, contra, contended that the corporation derived their power to tax the keeper of a wood-yard, from their power "to provide for the inspection of lumber and other building materials, and for the appointment of inspectors," and "to provide for the appointment of appraisers and measurers of builders' work and materials, and also of wood, coal, grain, and lumber," contained in the 7th and 8th sections of the charter of 1820; for the corporation cannot exercise their power of inspection and control over these matters without the power of granting licenses. He also contended that the keeper of a woodyard is a "retailer," and as such, liable to be taxed and regulated.

The COURT being of that opinion, reversed the judgment of the justice of the peace, and rendered judgment for the lowest penalty, viz., \$20.

CRANCH, C. J., dissented, and repeated the substance of his opinion before given in the cases of *Carey*, in November, 1836, (*ante*, 13,) and of *Barber*, in August, 1837, (*ante*, 157.)

SUSAN DECATUR v. DAVID YOUNG.

In an affidavit to obtain an attachment under the Maryland Act of 1795, c. 56, it is not necessary to state the plaintiff to be a citizen of the county of Washington, D. C.

MR. MORFIT, as *amicus curiæ*, moved the Court to quash the attachment, which had been issued under the Maryland Act of 1795, ch. 56, because the affidavit, upon which the attachment was awarded, did not state that the plaintiff was a citizen of the county of Washington, although she was stated to be a citizen of the District of Columbia. The law is only in force in this county, and the plaintiff must be either a citizen of this county or of one of the States of the Union; but as the affidavit only states that she was a citizen of the District of Columbia, she may be a citizen of the county of Alexandria, in which case she would not be entitled to the remedy under the statute, the words of which are that "if any person whatsoever, not being a citizen of this State, and not residing therein, shall or may be indebted unto a citizen of this State, or of any other of the United States," "such creditor may" apply to a judge, &c., and obtain a warrant to the clerk of the Court to issue an attachment, &c.

A citizen of Alexandria, cannot be said to be a citizen "of this

Hard v. Stone and Suttle.

State, or of any other of the United States." The words, "this State," in order to make the law applicable to this part of the State which was ceded by Maryland, must be construed to mean this county. *Mr. Morfit* cited *Mandeville v. Garret*, 6 Har. & Johns. 497, and *Yerby v. Lackland*, 5 Id. 416.

The COURT stopped *Mr. Marbury*, in reply, and overruled the motion, *nem. con.*

THOMAS HARD v. JAMES W. STONE and JOHN H. SUTTLE.

It is not necessary, in order to obtain an attachment under the Maryland Act of 1795, c. 56, that the instrument of writing produced to the magistrate, granting the warrant for the attachment, as the instrument by which the debtor is indebted, should, upon its face, show a complete cause of action; nor is it necessary that the affidavit should state the plaintiff to be a citizen of the United States; it is sufficient if the magistrate, granting the warrant, states that the plaintiff is a citizen of one of the States.

It is not sufficient ground for quashing the attachment, that the copy of the short note sent with the writ, has, by mistake of the clerk, the word "cash," instead of the word "each."

The Circuit Court of the District of Columbia has jurisdiction of an attachment issued by warrant of a justice of the peace.

ATTACHMENT under the Maryland Act of 1795, c. 56.

Mr. R. J. Brent moved to quash the attachment, because,

1. The instrument of writing produced to the magistrate who granted the warrant for the attachment, as the instrument by which the defendants were indebted, and which was a covenant under seal to pay for the hire of certain slaves, in a certain event, did not show, upon its face, that the defendants were indebted as stated in the plaintiff's affidavit. The cause of action would not be complete without additional evidence.

2. That the copy of the short note of the cause of action, sent out with the attachment, to be set up at the court-house door, has, by mistake of the clerk, the word "cash," instead of the word "each."

3. That the plaintiff's affidavit does not state that he was a citizen of the United States. It is only stated by the justice who issued the warrant for the attachment.

4. That this Court has no jurisdiction of an attachment issued by the warrant of a justice of the peace; because, by the Act of Congress of the 3d of May, 1802, [2 Stat. at Large, 193,] this Court only has power "to proceed in all common-law and chancery causes, which now are or hereafter shall be instituted before it, in which either of the parties reside out of the said territory, in the same way that non-residents are proceeded against in the

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general court, or in the Supreme Court of Chancery in the State of Maryland," and that the General Court of Maryland had no jurisdiction of attachments issued by warrants from justices of the peace. Those justices could only issue their warrants to the clerks of the county courts, not to the clerk of the general court. *Smith v. Greenleaf*, 4 Har. & McHenry, 162, 291.

Mr. Bradley, contra. The act does not require the plaintiff to swear that he is a citizen of the United States; it is sufficient if he is so in fact.

It is not necessary that the instrument of writing upon which the action is founded should, of itself, show upon its face a complete cause of action. The plaintiff's affidavit is positive as to the amount due, and what is necessary, in addition to the instrument of writing, may be supplied by parol evidence. The mistake of the clerk in copying the short note may be, at any time, corrected.

Independent of the Act of Congress of the 3d of May, 1802, [2 Stat. at Large, 193,] the law of Maryland, 1795, c. 56, had been declared by the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] to be and remain in force in this part of the district; and by that act this Court has jurisdiction of all cases in law or equity arising under the adopted laws of Maryland. Under the laws thus adopted, the plaintiff had a right to an attachment. It was a case in law, of which this Court has jurisdiction under the Act of 27th February, 1801, and has in fact exercised the jurisdiction from the first existence of the Court to the present time.

The COURT overruled all the objections, and refused to quash the attachment, (*nem. con.*)

FARMERS BANK OF VIRGINIA v. EDWARD OWEN.

If the payee of an inland bill of exchange indorse and deliver it to a bank to be transmitted to another bank for collection, and it be duly so transmitted, the bank to whom it is thus transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill.

ASSUMPSIT against the payee, indorser of an inland bill drawn at Hampton Roads, January 8, 1837, by A. H. Gillespie on J. W. Reckless, Perth Amboy, New Jersey, payable to the order of the defendant, Edward Owen, at six months after sight, for \$161.88, and indorsed "Edward Owen, by his agent and attorney, P. P. Mayo."

Upon the trial, evidence was given to prove the following facts: That the bill drawn and indorsed as above stated, was by Mr.

Mayo, the defendant's agent, delivered to the plaintiffs to be forwarded to some eastern or northern bank for collection. The plaintiffs sent it to the Union Bank of New York for that purpose, who transmitted it to a bank at Perth Amboy. The cashier of the Union Bank, supposing, by mistake, that the bill was payable six months after date, instead of "sight," in which case it would have been payable on the 11th of July, and not hearing any thing to the contrary, on the 9th of August gave notice to the plaintiffs that the draft had been paid, and passed to their credit, whereupon the plaintiffs remitted the net proceeds of the bill to the defendant by a draft on a bank in Baltimore. It afterwards appeared that the bill was not payable until the 14th-17th of August, when it was duly protested.

Mr. Z. C. Lee, for the defendant, contended that the Union Bank of New York was the agent of the plaintiffs, and if, by their mistake, the plaintiffs had paid the money to the defendant, they must look to the Union Bank and not to the defendant, and moved the Court to instruct the jury to that effect; but

The COURT (*THRUSTON, J.*, absent,) overruled the motion, and, at the prayer of *Mr. R. S. Coxe*, for the plaintiffs, instructed the jury, that if they shall believe, from the evidence aforesaid, that the plaintiffs received the draft in question from the agent of the defendant, for the purpose of being transmitted to the north for collection, and the said plaintiffs did, in due time, transmit the draft for collection, the bank in New York, to whom the draft was thus transmitted, became the agent of the defendant, and is responsible to him alone for breach of its duty in relation to said draft, and such breach of duty constitutes no defence to this action.

Verdict for plaintiffs.

BENJAMIN HOMANS v. W. W. MOORE.

A certiorari does not lie to a justice of the peace in a case of which he has jurisdiction. A plaintiff may relinquish interest upon an open account and bring his action for the principal sum only, before a justice of the peace, if the principal does not exceed the sum of fifty dollars, although, with interest, the debt would exceed that sum.

CERTIORARI, to Mr. Justice Thompson, issued by the Chief Judge of this Court on the 21st March, 1838, in vacation, upon the petition and affidavit of the debtor, B. Homans, which stated, in substance, that W. W. Moore had warranted him, before Mr. Justice Thompson, for \$47.20, which, if due at all is due with interest from November, 1834, and that the debt and damages exceed the sum of \$50, and the warrant and all proceedings under it are

illegal and *coram non judice*. That to prevent an appeal, the creditor claimed a trial by jury; who rendered a verdict against the petitioner, upon which the justice rendered judgment. That he has a fair, *bonâ fide*, legal defence, which was not allowed him upon the trial.

The petition was accompanied by another affidavit, stating that since the trial before the justice he has discovered that he can prove his set-off, which he did not know at the time of the trial; and that the present application is not for delay, but that substantial justice may be done.

The *certiorari* was returned at the last term, and a rule laid upon Mr. Moore, the plaintiff, to file his declaration.

Mr. Hoban, for the plaintiff, now moved the Court to quash the *certiorari* and all the proceedings thereon.

Mr. Bradley, *contrâ*, relied upon the order of the chief judge for the *certiorari*.

The COURT (CRANCH, C. J., not sitting) decided that the creditor may relinquish the interest upon the claim and recover the principal before a justice of the peace, if the principal does not exceed \$50; the claim being understood to be upon open account.

Certiorari quashed.

ELIZA C. BURR v. BURCH, Executor of Lippet.

When the question of interest is expressly reserved at the time of the receipt of the principal, such receipt is no bar to the recovery of the interest.

ASSUMPSIT, for a legacy. The plaintiff had given a receipt for the principal, reserving the question of interest to be afterwards settled.

Mr. R. S. Coxe, for the defendant, contended that interest cannot be recovered after the principal has been paid. *Dixon v. Parkes*, 1 Esp. Rep. 110; *Tillotson v. Preston*, 3 Johns. 229.

Mr. Bradley, for the plaintiff, admitted the rule, with the exception where the question of interest is expressly reserved.

The COURT (*nem. con.*) was of opinion, that where the question of interest is expressly reserved for future litigation at the time of the receipt of the principal, that receipt is no bar to the recovery of the interest.

MARY PANCOST v. CORPORATION OF WASHINGTON, Garnishee of
Elias Gurnaer.

An attachment under the Maryland Act of 1795, c. 56, is dissolved by the death of the principal defendant, and the appearance of his administrator.

ATTACHMENT under the Maryland Act of 1795, c. 56.

Elias Gurnaer, the principal debtor, having died since the last term, *Mr. Redin* moved the Court that the appearance of the administrator may now be entered and the attachment be dissolved.

He contended that the object of the attachment was only to compel an appearance; and that where, by the act of God, or of the law, the defendant cannot give bail and appear, the attachment should be discharged. The defendant, while living, had a right to appear, upon giving bail, which would have dissolved the attachment. But his administrator has a right to appear without bail, and the appearance dissolves the attachment. The attachment, and the action upon the *capias*, cannot be going on at the same time. The attachment did not transfer the property from *Mr. Gurnaer*; the attached effects would have remained his property until a sale under a judgment of condemnation, and did remain his property until his death, when they vested in his administrator as assets for which he is accountable in the due course of administration. No judgment had been rendered in the cause. *Nicholl v. Steam Packet Co.*, in this Court, June term, 1820, (2 Cranch, C. C. 211); and *Davis v. Marshall*, July term, 1804, (1 Cranch, C. C. 173); Sergeant on Attachments, 133; *Fisher v. Lane*, 3 Wils. 297.

Mr. C. Cox and *Mr. Bradley*, *contrà*. The defendant could not appear and give bail after the return of the *capias ad respondendum*. The object of an attachment is not to compel an appearance, but to enable a creditor to obtain satisfaction out of the property of his absent or absconding debtor. *Chase v. Manhardt*, 1 Bland's Ch. Rep. 344. The garnishee has pleaded *nulla bona* for himself and non assumpsit for the principal. This gives the plaintiff a lien on the funds in the hands of the garnishee.

The COURT (THRUSTON, J., *contrà*.) permitted the appearance of the administrator of the principal debtor without bail, and dissolved the attachment.

JOSEPH COSTIGAN *et al.* v. HENRY S. WOOD.

If the vendee of land, who has paid part of the purchase-money, enters into possession and fails to pay the residue according to the contract of sale, although de-

Mayor, &c. of Georgetown v. Chew.

manded, the vendor cannot maintain ejectment against him without a notice to quit, or a notice that the contract is rescinded, or a demand of payment and notice of rescinding.

EJECTMENT for lot No. 1, in square 882, in the city of Washington.

The defendant claimed under a contract of sale, upon which he had paid sixty-three dollars, and taken possession of the lot, but failed to pay the residue, long since due, and unpaid at the time of the demise from the lessor of the plaintiff, although demanded.

Mr. Bradley, for the defendant, moved the Court to instruct the jury, in effect, that the plaintiff cannot recover without a notice to quit, or a notice that the contract of sale was rescinded, or a demand of payment, with notice of rescinding.

The COURT (CRANCH, C. J., *contra*,) gave the instruction.

The plaintiff then gave such a notice, and had a verdict in his favor.

Mr. Bradley, for the defendant, cited *Jackson v. Rowan*, 9 Johns. 330; *Jackson v. Wheeler*, 6 Johns. 272; *Shepard v. De Bernales*, 13 East, 565.

Mr. R. J. Brent, for the plaintiff, cited *Smith v. Stewart*, 6 Johns. 45; 1 Saund. on Pleading, 565.

In the cases cited from 9 Johnson, 330, and 13 East, 565, the defendant was lawfully in possession and in no default; so also in the case of *Jackson v. Wheeler*, 6 Johns. 272. See *Smith v. Stewart*, 6 Johns. 46, and the cases cited in the margin of that case, 3d edition.

THE MAYOR, RECORDER, ALDERMEN, AND COMMON COUNCIL OF
GEORGETOWN v. SAMUEL CHEW.

The Corporation of Georgetown has power to rent fish wharves.

DEBT upon a bond for \$2,050, conditioned to pay to the plaintiff the sum of \$1,025 for rent of certain fish wharves belonging to the Corporation of Georgetown.

After oyer of the condition the defendant demurred to the declaration.

Mr. R. J. Brent, for the defendant, contended that the corporation had no power to rent fish wharves; no such power is given them by their charter; and no corporation can exercise a power not expressly given or necessarily implied from some express power. Angell & Ames on Corp. 145, 146.

But the COURT (CRANCH, C. J., not giving any opinion,) instantly overruled the demurrer without hearing *Mr. Dunlop*, for the plaintiffs.

 Ennis v. Holmead.

 CHESAPEAKE AND OHIO CANAL COMPANY v. UNION BANK OF
 GEORGETOWN.

The lots in the city of Washington lying on Rock Creek, are entitled to the water privilege in front of them, although separated from them by a public street, unless the bank of the creek lies between the street and the creek; and the owner of the lots is entitled to the condemnation money awarded for the water privilege in front of them condemned for the use of the Chesapeake and Ohio Canal Company.

So much of the water privilege of Rock Creek as lay west of lots No. 8, 9, and 10, in square No. 1, in the city of Washington, had been condemned for the use of the Chesapeake and Ohio Canal Company; and the question arose whether the Union Bank of Georgetown, to whom those lots had been conveyed by Leonard Harbaugh, who had purchased them, thirty years ago, from the United States, to whom they had been allotted upon the division of the square between the public and Robert Peter the original proprietor of the land, had a right to the condemnation money. This question was submitted to the Court.

Mr. C. Cox, for the Canal Company, contended that *Mr. Harbaugh* never had any water privilege as appurtenant to those lots because they were cut off from the creek by 28th Street west; and as the streets belonged to the United States, the water privilege belonged to them also; although *Mr. Harbaugh* built a wharf into the creek, thirty years ago, and he and those claiming under him have occupied the same ever since without interruption, or adverse claim, by any one; no part of the bank of the creek, and no dry land lay west of the street, one half of which was in the creek.

Mr. Dunlop, for the Union Bank, contended that the streets were conveyed to the United States only as highways, and did not deprive the riparian proprietors of their water rights, and referred to *Nicholas King's* letter in *Burch's Digest*, 329, 353, 359, the wharf regulations by the city commissioners in 1795, and the Maryland Act of 1791, c. 45, § 12.

The COURT (*THRUSTON, J.*, not sitting,) decided that the title of *Harbaugh* to his wharf was good against the United States, claiming under a private citizen, (*R. Peter*;) and that the Union Bank is entitled to the condemnation money.

GREGORY ENNIS, Executor of Mary Byrne, v. ANTHONY
 HOLMEAD.

A justice of the peace has jurisdiction against executors and administrators under the Act of Congress of March 1st, 1823.

APPEAL from the judgment of a justice of the peace against the
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appellant, upon a promissory note of Mary Byrne for \$40, due July 10th, 1834.

The COURT affirmed the judgment, which was for \$40, "with interest from date;" meaning, probably, the date of the judgment, namely, April 14th, 1838, and costs, one dollar and ten cents.

CRANCH, C. J., dissented. The question is whether a justice of the peace has jurisdiction in suits against executors and administrators where the debt and damages do not exceed the sum of fifty dollars, exclusive of costs.

It seems to me very clear that justices of the peace had no jurisdiction in causes against executors and administrators under the Maryland Act of 1791, c. 68.

1st. Because they were not liable to arrest; and the only process given by that statute to bring the defendant before a justice of the peace, was a warrant of arrest in the nature of a *capias ad respondendum*.

2d. Because an executor or administrator is not a debtor. He is always charged in the *detinet* only, not in the *debet*; and the act gives jurisdiction only to a justice of the county "wherein the debtor doth reside;" and he is "to hear and determine the matter in controversy between the creditor and debtor," "and if need be, charge the constable with the body of the debtor in execution."

3d. Because the justice of the peace has no authority to ascertain the amount of assets, and the debts due to other persons, so as to render judgment only for the plaintiff's proportion of the assets, according to the Maryland Act of 1798, c. 101; nor to appoint an auditor to ascertain the sum for which judgment shall be given; nor to give judgment for such further sum as the Court should thereafter assess on discovery of further assets.

This point was decided by this Court in the case of *Ritchie v. Stone*, in October, 1821, (2 Cranch, C. C. 258.)

This construction was also given by the courts of Maryland, and it was found necessary to pass a statute, after 1801, to give the necessary powers to justices of the peace, to enable them to exercise jurisdiction in such cases.

But it is said that the Act of Congress of the 1st of March, 1823, authorizes the justice of the peace "to try, hear, and determine the matter in controversy between the creditor and debtor, their executors and administrators," and that as the jurisdiction is given, all the means necessary for the exercise of that jurisdiction, must be given also.

But the question arises, whether the words, "creditor and debtor, their executors and administrators," give the justice of the

peace jurisdiction of cases against executors and administrators. There can be no objection to the justice's jurisdiction in cases where executors or administrators are plaintiffs, and such jurisdiction would be sufficient to give effect to the words, "their executors and administrators," in that clause of the statute.

It seems to me evident that the legislature of Maryland, by the Act of 1791, c. 68, intended to give jurisdiction to a single magistrate, only in the simple case of contract; and did not trust him with cases of tort or trespass, sounding in damages, or in cases against executors and administrators, where the plea of *plene administravit* might be pleaded, and the administration account examined and settled; involving questions of property to a vast amount, and questions of law of great importance.

The Maryland Act of 1798, c. 101, c. 8, (§ 6, 7, 8, and 9,) provides, that no executor or administrator "shall be compelled to put in special bail;" nor "to plead *plene administravit*, or any thing relative to the assets;" and when the debt or damages which the deceased (if he or she were alive,) ought to pay, shall be ascertained by verdict, or confession, or otherwise, the court, before whom the action was brought, shall thereupon assess the sum which the executor or administrator ought to pay, regard being had to the amount of assets in his hands, and the debts due to other persons;" or, the court may "refer the matter to an auditor, to ascertain the sum for which judgment shall be given; and in case the judgment shall be for a sum inferior to the real debt, or damages and costs, it shall go on and say that the plaintiff shall be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendant; and the court at any time afterwards, when applied to by the plaintiff, on three days' notice to the defendant, or his attorney, may assess and give judgment for such further proportionable sum as the plaintiff shall appear entitled to, regard being had, as aforesaid, to the amount of the debt and other claims."

From the purview of these provisions, it is evident that they are applicable only to courts of general jurisdiction; courts having power to appoint an auditor, and to compel the settlement of an administration account. No such power is given, by the Maryland Act of 1791, c. 68, nor by the Act of Congress of the 1st of March, 1823, [3 Stat. at Large, 743,] to a justice of the peace.

The jurisdiction of this Court (the Circuit Court,) is general, with the exception only of cases within the jurisdiction of a justice of the peace. If the justice has not jurisdiction of cases against executors and administrators, this Court has; so that there will be no failure of remedy.

Jennings v. Corporation of Washington.

Although the Act of Congress of March 1, 1823, [3 Stat. at Large, 743,] authorizes a justice of the peace to try, hear, and determine the matter in controversy "between the creditor and debtor, their executors and administrators," yet it is to be "in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do, when the debt or damages do not exceed the sum of \$20, exclusive of costs."

The object of this act was to extend the jurisdiction of the justices of the peace from \$20 to \$50, and to exercise that extended jurisdiction "in the same manner, and under the same rules and regulations, to all intents and purposes," as they were then authorized to do, when the debt or damages did not exceed \$20. It does not alter the nature or character of the causes submitted to their jurisdiction, but only the value of the matter in controversy.

For these reasons, I think the justices of the peace have not jurisdiction of causes against executors or administrators.



MARY JENNINGS v. CORPORATION OF WASHINGTON.

The Corporation of Washington, under the power to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, has a right to prohibit them from being out after ten o'clock, P. M.

APPEAL, from the judgment of a justice of the peace against the appellant, who was a free mulatto, for the penalty of \$10, for being out after ten o'clock at night, contrary to a by-law of the corporation.

Mr. Dermott, for the appellant, contended that the corporation had no authority to prohibit free persons of color from being out after ten o'clock at night. The charter only gives them power to restrain and prohibit disorderly meetings of free colored persons.

But the COURT (*nem. con.*) was of opinion, that the by-law in question was justified by the clause in the charter which gives the corporation power "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes."

Judgment affirmed, with costs.

UNION BANK OF GEORGETOWN v. THOMAS CORCORAN.

The defendant's note for \$7,400, made payable directly to the plaintiff, on demand, with interest, but not payable to order, and upon which there is an indorsement stating that it is held by the plaintiffs as collateral security for the defendant's obligation upon a previous note of Thomas Corcoran, senior, deceased, is not void under the statute of frauds as being a promise to pay the debt of another, without a consideration therein expressed.

In an action upon such a note, with such an indorsement, the burden of proof is on the defendant to show that the former note or some part of it had been paid.

If a bank discounts a note made payable directly to the bank, and takes the interest in advance, for the time the note has to run, it is not usury, such being proved to be the usage of the banks.

ASSUMPSIT upon the following promissory note :

"\$7,400.

Georgetown, May 3d, 1832.

On demand we jointly and severally promise to pay the President and Directors of the Union Bank of Georgetown, \$7,400, with interest from the 1st instant, for value received.

JAMES CORCORAN.

T. CORCORAN."

Upon which note was this indorsement ; "The within note is given as collateral security for our obligation to the Union Bank of Georgetown, on a note of Thomas Corcoran, deceased, for \$7,400, and is held by said bank only as collateral security for said note ; when, therefore, said note with the interest thereon shall have been paid, this is to be returned to us, or cancelled by said bank. T. Corcoran." And the following indorsement : "I reassume and reacknowledge the within note, and agree not to avail myself of limitations as a bar. T. Corcoran." 30th April, 1835.

Mr. Marbury, for the defendant, objected that this was a promise to pay the debt of another, and that it did not express the consideration, and therefore the plaintiffs could not recover.

But the COURT (*nem. con.*) overruled the objection, the plaintiffs' counsel, in opening the case to the jury, having admitted that certain property had been assigned to a trustee to be applied to the payment generally of the debts of Thomas Corcoran, senior, and that \$1,800 had been paid into the plaintiffs' bank, to be so applied, a proportion of which was applicable to the note of Thomas Corcoran, senior, mentioned in the indorsement aforesaid.

Mr. Cox, for the defendant, objected to the admissibility in evidence of the note upon which this action was founded.

But the Court overruled the objection, and the note was read. Whereupon the defendant's counsel prayed the Court to instruct the jury that upon this evidence the plaintiff was not entitled to recover ; or if entitled to recover, not more than nominal damages,

without first showing the note of Thomas Corcoran, senior, as described in the said indorsement, and showing further what amount of money is now due thereon; (Chitty, 154, last edition.) But the COURT, (THRUSTON, J. absent,) refused to give the instruction, and the defendant's counsel took a bill of exceptions.

The defendant's counsel then objected that the note of Thomas Corcoran, senior, being made payable directly to the President and Directors of the Union Bank of Georgetown, or order, and discounted by the bank to the credit of Thomas Corcoran, senior, the transaction was a direct loan, and not a mercantile discount, and that taking the interest in advance for the time the note had to run, was usurious; and that the note in suit, being given as a security for that loan, was void under the statute of usury.

Mr. R. J. Brent, having suggested that the same question would arise in another case now on the trial docket of this term, in which he was concerned as counsel, was permitted to argue the point to the Court.

He contended that there is a difference between a loan and a discount. The taking of the interest in advance can only be justified upon a real mercantile discount of negotiable paper actually negotiated, or by the usage of the banks, known to the legislatures at the time of granting the privilege of banking. Comyns on Usury, 86; Ord on Usury, 68; *Marsh v. Martindale*, 3 B. & P. 154; *Bank of Washington v. Thornton*, 3 Peters, 38; 3 Sergeant & Lowber, 95, note; Law of Maryland of 1836, ch. 272, authorizing the discount of notes made payable directly to the banks. *Bank of Kentucky v. Brooking*, 2 Littell's Kentucky Rep. 42.

On the other side, it was said that such notes are discounted in Boston daily. There cannot be usury without an intention to take usurious interest. *Bank of United States v. Waggener*, 9 Peters, 399; *Fleckner v. Bank of United States*, 8 Wheat. 354; Chitty, 100; *Bank of Kentucky v. Brooking*, 2 Littell, 42; *Wood v. Dummer*, 3 Mason, 308.

The COURT (CRANCH, C. J., giving no opinion, not having examined the authorities cited,) decided *instantly* that the transaction was usurious.

RICHARD ROE, on the demise of Daniel Carroll of Duddington, and of the Bank of Washington, v. ALFRED R. DOWSON.

A sale made by a trustee under a decree of the Court will not pass the title of land in the actual adverse possession of a third person at the time of the decree.

EJECTMENT for lot No. 9, in the square No. 687, in the city of

 Smith v. Frye.

Washington. The plaintiff claimed under a demise from the Bank of Washington, and also from Daniel Carroll, of Duddington.

The plaintiff gave in evidence, 1. A certificate of the original division of the square between the public and Mr. Carroll, by which the lot No. 9 was allotted to him. 2. A decree of this Court, in the cause of *G. Coombe v. D. Carroll*, of D., for a sale of the lot, and a sale by the trustee to the Bank of Washington.

The defendant showed that he was, at that time, in actual possession of the lot, holding it adversely to Mr. Carroll, who has received the whole purchase-money due by the defendant for the lot. There had been no notice to Dawson to quit.

The COURT (*nem. con.*) was of opinion, that as the defendant held an actual adverse possession at the time of the decree for a transfer of the legal title from Mr. Carroll to the Bank of Washington, neither the demise by Mr. Carroll, nor that by the bank was a valid demise.

The plaintiff became nonsuit.

Mr. Marbury, for the plaintiff.

Mr. Jones, for the defendant.

JOHN M. YOUNG *et al.* v. JOHN DAVIDSON.

In taking a deposition under the 30th section of the Judiciary Act of 1789, the notice must be given by the magistrate before whom the deposition is to be taken; a notice given by the party is not sufficient.

ASSUMPSIT for work and labor.

Upon the trial, *Mr. R. J. Brent*, the plaintiffs' counsel, offered to read in evidence to the jury the deposition of one F. A. Russell, taken *de bene esse*, before the Mayor of Washington.

Mr. Marbury, for the defendant, objected that the notice to the defendant was given by the plaintiffs, and not by the magistrate, as required by the Act of Congress of 24th September, 1789, § 30, [1 Stat. at Large, 73,] and the COURT, (THRUSTON, J., absent,) for that reason rejected the deposition.

RICHARD SMITH v. NATHANIEL FRYE.

The debts due to the late Bank of the United States, on the 3d of March, 1836, were not extinguished by the expiration of the term for which the corporation was created; and it had a right to use its corporate name, style, and capacity, for a further period of two years, for the final settlement of its affairs. A note given after the 3d of March, 1836, to the plaintiff, (who was an agent of the Bank of the United

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States,) by way of renewal of a note due before that day, was not void ; nor was it necessary to use the name, style, or capacity of the bank to enable the plaintiff to recover upon such a note.

ASSUMPSIT upon the defendant's note, dated May 17, 1836, by which 60 days after date he promised to pay to the order of Richard Smith, cashier, &c., \$6,063, for value received, payable at the office of the Bank of the United States, at Washington. This note was given in renewal of a note to the plaintiff dated March 15, 1836, which was given in renewal of a note to the plaintiff, due November 17, 1835.

Mr. Hellen, for the defendant, contended that the debts due to the bank were extinguished by the expiration of the term for which the charter was granted, unless there is some saving clause. 2 Kent's Com. 307. The note was given to the plaintiff as agent of the bank, and must be considered as given to the bank itself. But the bank was not competent either by itself, or an agent, to make a new contract. If the plaintiff was appointed as agent before the 3d of March, 1836, his authority ceased on that day by the expiration of the charter. *Angell & Ames on Corporations*, 161. The renewal of a note constitutes a new contract, which abrogates the old one. *Thornton v. Bank of Washington*, 3 Peters, 41, 42. The charter reserves no authority to make a new contract. The twenty-first section of the charter, which authorizes "the use of the corporate name, style, and capacity, for the purpose of suits, for the final settlement and liquidation of the affairs and accounts of the corporation, and for the sale of their estate, real, personal, and mixed ; but not for any other purpose, or in any other manner whatsoever, nor for a period exceeding two years after the expiration of the said term of incorporation," gives no power to make new contracts. It gives no implied powers ; it only saves existing contracts. It is only a power to use the corporate name, style, and capacity, for the purpose of suits on subsisting contracts ; and of suits for the final settlement and liquidation of their affairs and accounts. The use of the name, style, and capacity, is limited to the objects named in the twenty-first section ; otherwise the words, "for no other purpose," would have no meaning or use. The bank might have enforced the payment of the note due on the 17th of November, 1835, and may yet.

Mr Hellen then prayed the Court to instruct the jury, in substance, as follows, namely : That if the note of 17th May, 1836, upon which this suit was brought, was given in renewal as aforesaid, to the plaintiff, as agent of the Bank of the United States, he cannot recover in this action ; the charter of the bank having expired on the 3d of March, 1836.

Allen v. Croghan.

Which instruction the Court (THRUSTON, J., absent,) refused to give.

He then prayed the Court to instruct the jury, in effect, that if the plaintiff, as agent of the bank, discounted the note on which suit was brought, he cannot recover.

Which instruction the Court also refused to give.

He then further prayed the Court to instruct the jury, in effect, that if the note in suit was given to the plaintiff as agent of the bank, according to the usage or direction of the bank, in renewal of notes for \$6,000, theretofore discounted by the bank, or its branch at Washington, and that the plaintiff has charged and taken from the defendant more than six per cent. interest on the loan, the same is usury and in violation of the charter of the bank, and the plaintiff is not entitled to recover.

But the COURT refused this instruction, also, and the defendant took his bill of exceptions; but has not taken a writ of error.

SOLOMON AND MOSES ALLEN v. GEORGE CROGHAN, Garnishee of
J. S. Nicholls.

When the judgment against the principal is for a larger sum than the real debt, to be released on payment of the real debt with interest until paid; upon which judgment an attachment is issued by way of execution under the Maryland Act of 1715, c. 40, § 8; and judgment of condemnation is rendered, of the effects in the hands of the garnishee, and execution is issued thereupon, the marshal may levy the whole debt and interest to the time of payment, if there are effects of the principal to that amount in the hands of the garnishee.

THIS was an attachment issued by way of execution under the Maryland Act of 1715, c. 40, § 8, to condemn the effects of Isaac S. Nicholls in the hands of George Croghan, his garnishee, upon a judgment obtained against Nicholls for \$1,000 damages and costs, to be released on the payment of \$560, with interest thereon from the 7th of April, 1832, until paid.

Judgment of condemnation having been obtained, *Mr. C. Cox*, for the garnishee, contended that the marshal could not levy interest upon the debt accruing after the day upon which the judgment of condemnation was entered up.

But the COURT decided and said, that as the original judgment was for a larger amount than the real debt, to be released upon payment of the real debt with interest from a certain day until paid, the interest may be levied up to the day of payment, if there are sufficient effects in the hands of the garnishee.

BANK OF THE METROPOLIS v. THOMAS P. MOORE.

Under a power of attorney from several persons to sign a joint promissory note, the attorney may make a joint and several promissory note, the purpose of the parties being to renew a joint and several note which had been discounted by the plaintiff; or, if the power was defective, the note was only void to the extent to which the attorney exceeded his authority; that is, as a several note, but was valid as a joint note.

This discount, by a bank, of a note made payable directly to itself, is not usurious; such being the usage of the banks.

ASSUMPSIT, upon the following promissory note:

\$5,000. Washington, 16th February, 1837. Sixty days after date, we jointly and severally promise to pay the President and Directors of the Bank of the Metropolis, or order, at the said bank, five thousand dollars, for value received. Richard M. Johnson, Thomas P. Moore, P. H. Pope, by their attorney, George Thomas."

The first count of the declaration states, that on the 16th of February, 1837, the defendant and one Richard M. Johnson, and one P. H. Pope, by George Thomas, their attorney, at Washington county, made their note, &c., and thereby, sixty days after the date thereof, jointly and severally promised to pay, &c.

The second count avers, that the defendant, on the 16th of February, 1837, by George Thomas, his attorney, at the county aforesaid, made his certain note, &c., and thereby, sixty days after the date thereof, promised to pay, &c.

To these were added the common money counts, one of which was for money had and received to the plaintiff's use.

The cause came to trial upon the general issue.

Mr. Coxe, for the plaintiffs, offered in evidence the note of the 16th of February, 1837, and the following power of attorney to Mr. Thomas, who was also cashier of the plaintiff's bank.

"Whereas we have a joint and several note of hand, discounted in the Bank of the Metropolis: Now, know all men by these presents, That we, Richard M. Johnson, Thomas P. Moore, and P. H. Pope, all of the State of Kentucky, do hereby nominate, constitute, and appoint, George Thomas, of the city of Washington, our true and lawful attorney in fact, and by these presents do authorize and empower him, for us and in our names, to sign our joint note to the president and directors of the Bank of the Metropolis, for five thousand dollars, for our accommodation, and the same to renew from time to time as it may become due, for the whole or any part thereof. Hereby ratifying and confirming all and every the act and acts of our said attorney, in and about the premises, so long as the bank shall continue the accommodation

to us. In witness whereof, we have hereunto set our hands and seals, at the city of Washington, the 29th day of February, 1836.

	RICHARD M. JOHNSON, (Seal.)
Witness, Samuel Stettinius.	P. H. POPE, (Seal.)
	T. P. MOORE, (Seal.)

Messrs. Brent & Brent, for the defendant, objected to the plaintiffs' counsel reading the note in evidence, because it appeared to be a joint and several note, whereas the power of attorney only authorized Mr. Thomas to sign a joint note. Every power must be strictly pursued. *Bank of Columbia v. Patterson*, 7 Cranch, 290.

Mr. Coxe, contrà. The power of attorney recites that they had a joint and several note discounted by the bank, and the presumption is that the note which they authorized Mr. Thomas to sign was intended to renew that joint and several note, and was to be such a note as would effect that object; but a joint note would not have been satisfactory to the bank; they would not have received it in lieu of the former note.

But the plaintiffs may recover upon the common counts. The only difference is in the form of the action. If the note is a joint note only, the defendant cannot object to reading of it in evidence. He can only plead the non-joinder of the other parties to the note, in abatement.

The plaintiff also offered evidence to prove that on the 27th of March, 1834, the defendant, with Richard M. Johnson and P. H. Pope obtained a discount of their joint and several note payable directly to the bank by its corporate name for \$5,000 at four months, and drew the proceeds by their joint check, amounting to \$4,896.67; which note was not paid at maturity, but laid over until the 30th of January, 1836, when it was cancelled, the arrears of interest paid up and a new joint and several note given by the same parties for \$5,000, payable to the bank or order six months after date, which was also discounted by the bank, and the proceeds, (namely, \$4,836.67,) carried to the credit of the makers. That Mr. Thomas, professing to act under and by virtue of the power of attorney aforesaid, made the note upon which the suit was brought, which was also discounted by the plaintiffs, and the proceeds, (\$4,946.67,) carried to the credit of the makers, and the arrears of interest being paid up, the note of the 30th of January, 1836, was cancelled; to the admissibility of all which evidence, the defendant, by his counsel, objected; but

The COURT (CRANCH, C. J., *contrà*), overruled the objection and admitted the whole of the evidence (including the note, upon which the suit was brought,) to be given in evidence; and the defendant took his bill of exceptions.

Bank of the Metropolis v. Moore.

THRUSTON, J., was understood as being of opinion that it appeared to be the intent of the parties to authorize Mr. Thomas to make such a note as would be received by the bank in lieu of the old joint and several note; and that the bank would not have received a mere joint note in the place of a joint and several note; and that the power should be construed according to such intent.

MORSELL, J., was understood as being of opinion that if the power was defective, the note was only void to the extent in which the attorney exceeded his authority, and that it was good as a joint note, if not as a joint and several note.

CRANCH, C. J., was of opinion that the attorney, having exceeded his authority in making the note joint and several, it was altogether void, and was inadmissible upon the counts upon the note, if not upon all the counts; and that the Court ought to reject it.

After the Court had thus admitted the note in evidence, the plaintiff offered evidence, by the testimony of Mr. Thomas, the cashier, "that the money would not have been loaned but upon the joint and several note of the parties;" and that "the power of attorney was given for the single purpose of acting for said parties in relation to said last-mentioned note, and the renewal thereof," that is, the note of the 30th of January, 1836.¹

The defendant's counsel, in addition to the evidence already stated, offered evidence tending to prove that the banks in Washington county in the District of Columbia, have been in the practice (some banks for less, and some for more than twenty years,) of taking and discounting notes in the form of the one now in suit, made directly to the banks or some of their officers for their use, whenever offered, and that the banks preferred to loan upon such paper; that the reason of this practice has been one of mutual convenience to the borrower and to the banks; the first being saved from the costs of protest; and the last being saved the risk of a failure to give notice to the indorser; and that it was very usual for the banks to lend money on a pledge of stock, taking in return the single note of the borrower payable to the banks or some of their officers without indorsement. That it had been the practice and usage of the said banks in this county, to discount, indiscriminately, paper on which there was an indorser or indorsers, or in which all the parties were drawers, and the paper drawn directly to the bank itself or some of its officers acting in its

¹ Upon this evidence being given, CRANCH, C. J., made the following memorandum in his note-book. "This evidence was given after the Court had decided that the note should be read in evidence; and perhaps decides the case in favor of the plaintiffs upon error in the Supreme Court; but although the intent may have been so, yet the means are not sufficient in law to execute that intent. W. CR."

behalf; that both were considered equally the subjects of such discount, but that in all of the said banks the major part of the accommodation paper discounted was in the form of notes drawn by one party in favor of another person who indorsed it to the bank; and that the note in suit was discounted in the usual manner.

The defendant then offered evidence that on the 27th of March, 1834, the plaintiffs discounted the joint and several note of R. M. Johnson, P. H. Pope, and the defendant, for the amount of \$5,000, and reserved out of the proceeds thereof \$103.33 as interest or discount upon the same for four months and four days; that the said note laid over unpaid, until the 30th of January, 1836, when the sum of \$450 was paid on the same as interest in arrear; and that on the same day a second note was given by the same parties to the plaintiffs in renewal of the first described note, payable in six months after its date, which was discounted by the plaintiffs, who at the time of discounting the same received the sum of \$153.33 as interest on the same for six months and four days. That this note also laid over until the 16th of February, 1837, when the sum of \$166.67 was paid on it as interest in arrear from the 30th of July, 1836, to the 16th of February, 1837, on which day the note in suit was given in renewal of the last described note, and was on the same day discounted by the plaintiffs, who then received the sum of \$53.33 as the interest in advance for sixty-four days:

Whereupon the defendant's counsel prayed the Court to instruct the jury, as follows:

1. That if they should believe, from the evidence, that the note in suit was given in renewal of other notes previously given by the same parties to the plaintiffs, who received or reserved in advance, as discount, the interest at the rate of six per cent. per annum on the amount of the debt mentioned in said notes or any of them, for the times they or any of them had to run, then the receipt or reservation of said interest in advance, is evidence of usury, and the jury may infer usury from the same.

2. That if the jury believe, from the evidence, that the note in suit was given in renewal of other notes successively given by the same parties to the plaintiffs for the amount of \$5,000 loaned to the said parties by the plaintiffs, and that at the time of the original loan the plaintiffs reserved the interest on the said sum of \$5,000, at the rate of six per centum per annum for the time the original note had to run; or that at the time of renewing or discounting the note in suit the plaintiffs received of the makers thereof, or any one for them, the interest in advance for the period of sixty-four days, then said facts are evidence of usury in the

transaction, and the jury may infer usury from said facts, in said note in suit.

3. That if the jury believe from the evidence, that the note in suit was given to the plaintiffs in renewal of a note, for the same amount, drawn by the same parties directly to the plaintiffs as payees, payable six months after date, which had been previously discounted by the plaintiffs for the accommodation of the said parties; and that, on said note, drawn at six months, the plaintiffs received, at the time of discounting it, the interest in advance, for six months and four days, at the rate of six per cent. per annum, on the amount of said note; the said facts are evidence of usury; and it is competent for the jury to infer usury in the note in suit.

4. That if the jury believe from the evidence, that the plaintiffs received, on the day of the date of the note in suit, the sum of \$166.67 as and for interest alleged to be due from the 30th of July, 1836, to the 16th of February, 1837, (six months and seventeen days,) on a prior note for \$5,000 given by the same parties to the plaintiffs, falling due on the said 30th of July, 1836, and that the note in suit was given in renewal of the said note falling due on the 30th of July, 1836, then the plaintiffs have taken illegal interest, and it is competent for the jury to infer that the note in suit was given in pursuance of an usurious agreement.

5. That the written power of attorney executed to George Thomas by the defendant, together with R. M. Johnson and P. H. Pope, gives no authority to said Thomas to execute a joint and several note in behalf of the said parties, and that the defendant cannot be charged in this action, by reason of any joint and several note purporting to be executed by the said R. M. Johnson, P. H. Pope, and this defendant, by the said Thomas, as their attorney under said written power.

But the COURT (CRANCH, C. J., *contrà*,) refused to give any of the said instructions; and the defendant took his bill of exceptions.

CRANCH, C. J., dissented, because the transaction seemed to him, from the evidence as stated in the prayer for the instructions, to be a direct loan of the sum of \$4,896.67, to be repaid at the end of the four months and four days, with the sum of \$103.33 for the forbearance of the said sum of \$4,896.67, for the said four months and four days, which was three dollars and thirteen cents more than at the rate of six per centum per annum, in direct violation of the Statute of Usury; and a practice in violation of the law cannot justify an illegal transaction. Interest in advance can only be justified in a regular mercantile discount of negotiable paper.

Hill v. Scott.

The defendant carried the cause, by writ of error, to the Supreme Court, where the judgment was affirmed upon the money counts, without giving any opinion as to the admissibility of the note of the 16th of February, 1837. Upon the question of usury they would not permit the counsel for the plaintiff in error to argue; "the point being considered as settled;" but they did not say in what case. 13 Peters, 302.

DAVID HILL v. ROBERT K. SCOTT.

A person who borrows checks payable to bearer, to raise money upon for his accommodation, but has not indorsed them, is a competent witness for the defendant to prove usury.

The plaintiff is affected by the usury, although he did not know it when he purchased the checks.

By the law of Pennsylvania, in case of a loan by the plaintiff to the defendant, at a higher rate of interest than six per cent. per annum, the plaintiff can only recover the sum actually lent, with lawful interest; and the burden of proof is on the plaintiff to show the actual amount paid by him to the defendant.

ASSUMPSIT against the drawer of sundry checks, payable to bearer, amounting altogether to \$465, purchased by the plaintiff for \$265, of a broker. These checks were lent by the defendant to W. B. Hart, to enable him to raise money upon them for his accommodation. The defendant, having given Hart a release, called him as a witness.

Mr. R. J. Brent, for the plaintiff, objected to Hart as a witness, because, although his name is not upon the paper, yet he has passed it away, and upon principles of public policy ought not to be permitted to discredit the negotiable paper to which he had given currency, and to testify to his own turpitude.

But the COURT overruled the objection.

Mr. Brent then prayed the Court to instruct the jury, in effect, that the plaintiff cannot be affected by the usury unless he knew it when he purchased the checks. *Floyer v. Edwards*, Cowp. 115; *Whitworth v. Adams*, 5 Rand. 333; *Taylor et al. v. Bruce*, Gilm. Rep. 42.

The COURT (CRANCH, C. J., not giving any opinion) refused to give the instruction.

Mr Brent, then contended that by the law of Pennsylvania, to constitute usury, there must be a loan. See the Pennsylvania Act of 1823, Digest, p. 369. The act is only penal. The usury does not invalidate the contract against a stranger, without notice. *Fleckner v. Bank of the United States*, 8 Wheat. 354; *Turner v.*

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Calvert, 12 Serg. & Rawle, 46; *Wycoff v. Longhead*, 2 Dall. 92; *Musgrove v. Gibbs*, 1 Id. 217.

The COURT was of opinion, that if the jury should find the law of Pennsylvania to be as in the statute of 1823, and that this was a loan of money by the plaintiff to the defendant at a higher interest than at the rate of six per centum per annum, the plaintiff cannot recover more than the amount paid by the plaintiff for the check with lawful interest thereon.

THRUSTON, J., however, was of opinion that, in such case, the plaintiff could not recover any thing.

Mr Bradley, for the defendant, contended that the burden of proof was on the plaintiff to show what he paid for the checks, as they had been delivered by the defendant to Hart, in blank, to be filled up by him, to raise money upon for his accommodation, the defendant never having received any consideration therefor; *Woodhouse v Holmes*, 10 Johns. 231; and having given evidence that Hart received only \$265 for checks for \$465, post-dated five months.

The COURT (*nem. con.*) was of opinion that if the plaintiff would recover more than the \$265 on the checks for \$465, he must show that he paid more for them.

Verdict for the plaintiff, for the amount paid by the plaintiff for the checks with lawful interest thereon.

SAMUEL CUNNINGHAM, for the use of William Remington, v. ZACHARIAH M. OFFUTT, and OTHO M. LINTHICUM v. THE SAME.

A *fiery facias* binds the goods only from the time of its delivery to the marshal; and if it be returned without being levied upon the goods, its lien ceases; and a subsequent *fiery facias*, issued at the suit of another creditor upon a subsequent judgment, and levied upon the goods, must be satisfied before a second *fiery facias* afterwards issued by the first creditor upon the prior judgment.
The execution first delivered to the marshal must be first served.

THIS was a motion by Remington to order the marshal to pay over to him \$69, which he had made under a *fiery facias* at the suit of Linthicum against Offutt; and the matter was submitted to the Court upon the following case stated.

On the 26th of May, 1835, a *fiery facias* was issued at the suit of Cunningham against Offutt, which came to the hands of the marshal on the next day, and was levied upon a negro boy appraised at \$350. The boy was replevied by William Remington, claiming him under a bill of sale from Offutt. On the trial of the action

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of replevin, judgment was rendered for the defendant in replevin, and a return of the boy awarded. After which, it was agreed between Offutt, Remington, and Cunningham, that the latter should take the boy in part of his execution, without a public sale, at a sum which left a balance of \$69 unpaid on the execution; which balance Remington paid to Cunningham, and took an assignment of his judgment for a like amount.

Before this arrangement was made, namely, on the 15th of August, 1837, a *fiery facias* was issued at the suit of Otho M. Linthicum, against the said Offutt, which came to the marshal's hands on the 1st of September, 1837, and was, on the 11th of November, 1837, levied on sundry household furniture, &c., not including the negro boy.

On the 17th of November, 1837, Remington caused a *fiery facias* to be issued for his use, upon the judgment of Cunningham against Offutt; which execution came to the hands of the marshal on the 18th of November, 1837; and was levied on the same property upon which the *fiery facias* of Linthicum against Offutt had been levied; and which was sold by the marshal. Remington claimed a priority of payment of his \$69 out of the proceeds of the sale, and notified the marshal to retain that sum for his use, and to pay it over to him; to which Linthicum objected. The question was submitted to the Court without argument.

CRANCH, C. J. The execution of *Cunningham*, for the use of *Remington v. Offutt*, which was issued on the 17th of November, 1837, purports to be an original *fiery facias*; not an *alias*. It contains no reference to any former execution, and is for the whole amount of the original judgment.

The execution of *Linthicum v. Offutt*, which was issued on the 1st of September, 1837, appears, also, to be an original *fiery facias*, and was delivered to the marshal on the same day, who levied it upon certain property of the defendant, Offutt, on the 11th of November, 1837.

The execution of *Cunningham*, for the use of *Remington*, was delivered to the marshal on the 18th of November, 1837, and levied on the same property. The execution of *Linthicum*, having first come to the hands of the marshal, must be first satisfied.

But it is said that *Cunningham's* execution for the use of *Remington* was an *alias fiery facias*, the first having issued on the 27th of May, 1825, and delivered to the marshal on the same day, and levied upon a negro-boy, who was replevied out of the marshal's hands by *Remington*, but afterwards delivered to *Cunningham*, at a certain price, in part satisfaction of his judgment, and that a balance of \$69 was paid to *Cunningham* by *Remington*.

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ton, who took an assignment of the judgment to that amount, and issued the above-mentioned *fiери facias* on the 17th of November, 1837.

I think this makes no difference. The first execution was not levied upon this property on which Linthicum's execution was levied; and although the personal property is bound by the delivery of the execution to the marshal, yet, if that execution be returned, it is *functus officio*, and if a new *fiери facias* be issued, it binds the goods only from the time of its delivery to the marshal.

By the Statute of Frauds and Perjuries, 29 Car. 2, c. 3, § 16, "no writ of *fiери facias*, or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners to be executed."

The *fiери facias* of Cunningham for the use of Remington, therefore, could not bind the property of the goods against which it was sued forth, but from the 18th of November, 1837, the day it was delivered to the marshal; whereas Linthicum's *fiери facias* bound the property of the goods from the 1st of September, 1837.

I am, therefore, of opinion, that the sum of \$69 which the marshal has retained, to abide the opinion of the Court upon this question, ought to be paid over to Mr. Linthicum.

MORSELL, J., concurred.

THRUSTON, J., absent.



YATES & MCINTIRE v. ARDEN *et al.*, the Heirs at Law and Administrator of D. D. Arden, deceased.

If an agent, whose duty it is to keep the goods and effects of his employer separate, mix them with his own, it lies upon him to distinguish them; and if he cannot, the whole is to be considered as belonging to the other; and every sort of profit derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for.

If the bill be originally filed by the complainants "for themselves and such other creditors as shall choose to come in and contribute to the expenses of the suit," the complainants, before answer, have a right to amend their bill by striking out those words, although some of the other creditors shall have filed their petitions to be let in as complainants; but the complainants must pay the petitioners their costs.

BILL in equity, having a double aspect. 1. To charge the real estate of D. D. Arden, deceased, with payment of debts due to the plaintiffs, "and such other creditors of D. D. Arden as shall come in and contribute to the expenses of the suit;" and 2d, to

obtain the exclusive benefit of such of the real estate as was purchased by the deceased, with the plaintiffs' funds, and as their agent; and to obtain a decree for the sale of the whole of the real estate. The plaintiffs claimed to be creditors to the amount of \$35,301.51, and averred that the personal estate was insufficient to pay the debts of the intestate.

The heirs at law, without having answered the bill, filed a cross-bill against Yates & McIntire, and the administrator of D. D. Arden's estate, averring that the intestate carried on an extensive and profitable business in Washington upon his own account. That the defendant, John M. Maury, was appointed his administrator, and returned an inventory by which it would seem that the personal estate would be insufficient to pay the debts, but they have no means of ascertaining the correctness of the same. That Maury, the administrator, is the agent of the plaintiffs, and, as such, is in the possession of all the books and papers of the deceased; and represents that the intestate, in all his transactions, acted exclusively for the plaintiffs. These complainants are unable to answer the bill of the plaintiffs, Yates & McIntire, with any degree of accuracy, and pray that Yates & McIntire may specify all the transactions of the deceased in which they were interested; and that the defendant Maury may produce the books and papers of the deceased, and that the defendants may account for all the property which came to their hands.

Before any answer had been filed to either of those bills, the Bank of the United States and M. & H. Carey, respectively filed their petitions as creditors of the intestate, stating that his personal estate is insufficient to pay his debts. That Yates & McIntire, claiming to be creditors, and professing to act in behalf of all the creditors, &c., have filed their bill to subject the real estate to the payment of the debts of the deceased; but claim that the real estate, or a great part of it, was purchased with their funds, and therefore they claim a priority of payment, &c. That these petitioners deny the facts to be as averred by Yates & McIntire in their said bill; and, if true, deny their right to priority of payment; and suggest the inconsistency of thus professing to act for all the creditors, and at the same time claiming priority of payment; and they pray the Court to compel them to elect upon which ground they will proceed; or to carry on the litigation, so far as their claim for preference is concerned, at their own expense, and that the petitioners may be admitted as parties to so much of the said bill as seeks to promote the common interest of all the creditors; and to resist so much as is at variance with their rights as creditors; and for general relief.

Before any answer was filed to the bill of Yates & McIntire,

but after the Bank of the United States and the Messrs. Carey had filed their petitions, Yates & McIntire amended their bill by striking out the words "in behalf of themselves and such other creditors as shall choose to come in," &c., and by charging that the defendants, the heirs of the intestate, had entered upon the real estate, and were in receipt of the rents and profits, greatly exceeding \$1,500 a year, which ought to be subject to the payment of the debt due by the intestate to the plaintiffs, the said real estate having been purchased with their funds improperly applied by him as agent, whereby he became a trustee for their benefit, and the defendants must take the same, subject to all the plaintiffs' legal and equitable claims thereon; and praying that a receiver may be appointed. Yates & McIntire, and Mr. Maury answered the cross-bill; and it was agreed that the cross-bill of the heirs should be received as their answer to the bill of Yates & McIntire, and that the answer of Mr. Maury should be read as his deposition in the same suit; that general replications should be filed to the respective answers, and that the causes should be set for hearing, and submitted upon the respective bills, answers, and general replications, and the deposition of Mr. Maury.

CRANCH, C. J., delivered the opinion of the Court.

The facts which it is incumbent on Yates & McIntire to prove, in order to justify a decree in their favor, to the extent of their prayer for relief, are

1. That the intestate, D. D. Arden, was their agent for the sale of their lottery tickets, upon commission.

2. That, as such agent he received a large number of tickets which he sold for their account, and that he was indebted to them in a large amount at the time of his death, and that, on the 1st of June, 1836, there remained due to them, the sum of \$31,074.10.

3. That D. D. Arden died seized or possessed of real estate, as alleged in their bill, the whole, or a large part of which, was purchased by the deceased, with the funds of the plaintiffs, Yates & McIntire. That if any part thereof was purchased and paid for with the separate and individual funds of the deceased, it is so mingled with the part purchased with the funds of the plaintiffs, Yates & McIntire, that it cannot be discriminated by the plaintiffs.

4. That so far as the plaintiffs, Yates & McIntire, seek to charge the real estate, if any, which was purchased with the separate funds of the deceased, they must show that his personal estate was insufficient to pay his debts.

None of these facts were denied in the cross-bill of the heirs, which is received as their answer to this bill; and they are all proved by the answer of Mr. Maury, which is received by consent as his deposition in this suit.

Theobald, in his treatise on Principal and Agent, p. 369, says, "and this principle will be found to be established, by many authorities, as a settled rule in equity, that if an agent, whose duty it is to keep the property of his employer separate, mix it with his own, it lies upon him to distinguish them; and if he cannot distinguish what is his own, the whole is to be considered as belonging to the other." And in page 371, he says, "every sort of profit or advantage, clandestinely derived by an agent, from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for." Malyne, 151. See *Lord Chadworth v. Edwards*, 8 Ves. 48; *Lupton v. White*, and *Panton v. Panton*, 15 Ves. 436.

These plaintiffs, therefore, have a right to consider the whole real estate of the deceased in this district as belonging to them, and either to have it specifically conveyed, they paying any balances of the purchase-money which may be due; or, to have it sold, and the proceeds of the sales, after paying such balances, if any there are, to be appropriated to the extinguishment of their claim against the deceased.

It has been suggested, that after the Bank of the United States, and M. and H. C. Carey, other creditors of the deceased, had come in, according to the invitation of the bill, the plaintiffs had no right to amend it so as to exclude those creditors who had come in under the invitation of the original plaintiffs, Yates and McIntire.

The Bank of the United States, and the Messrs. Carey, had by their petition prayed to come in, not to aid the original plaintiffs, but to controvert the plaintiffs' claim to the property purchased by their agent with their funds, and to be admitted to the benefit of so much of the bill as seeks to promote the common interest; at the same time averring the bill to be incongruous, and liable to be defeated upon demurrer. In order to avoid this objection, the original plaintiffs amended their bill, by striking out the invitation, and leaving the bank and the Messrs. Carey to pursue their own course; and the question now is, whether they had a right so to do.

We think they had; but they must pay the petitioners their costs.

The plaintiffs having shown that a large part of the real estate was purchased by the deceased with their funds, and the defendants having failed to show what part, if any, was purchased with the separate funds of the deceased, the Court will order the whole to be sold, and the proceeds to be brought into court to be disposed of as the Court shall direct.

WILLIAM G. W. WHITE v. CLARKE AND BRISCOE.

When a decree of this Court is affirmed by the Supreme Court of the United States, and a mandate is sent to this Court, commanding that such execution and proceedings be had in said cause as according to right, justice, and the laws of the United States, ought to be had, the appeal notwithstanding; and this Court makes an order that the defendants without further delay, perform the decree thus affirmed with costs, this order is not such a judgment or decree as may be superseded under the Maryland Act of 1791, c. 67.

On the 10th of June, 1837, this Court decreed that the injunction, in this case granted, restraining the defendants from transferring certain promissory notes which the plaintiff had given them, should be perpetual; that the defendants should, without delay, bring the said notes into court to be cancelled, and should pay the plaintiff \$1,083.55, (being the amount paid by him on three judgments obtained against him by Clagget and Washington, on three notes which the defendants had passed to them before maturity,) and interest thereon from the said 10th of June, 1837, and that they pay the costs of the suit. From this decree, the defendants appealed to the Supreme Court of the United States, who, on the 22d of February, 1838, affirmed the same with costs, and damages, at the rate of 6 per cent. per annum, and sent a mandate to this Court, commanding that "such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." Whereupon this Court, on the 11th of April, 1838, after reciting the decree of this Court of the 10th of June, 1837, the appeal, the affirmance, and the mandate, ordered that the defendant, without further delay, bring the notes into court to be cancelled, and the said sum of money with interest thereon, and the costs of this suit, and \$142.88, the complainants' costs in this suit in the Supreme Court, to be paid to the complainant; and that herein the said defendants fail not.

The defendants brought the notes into court, but instead of bringing the money into court, produced a certificate from two justices of the peace, that on this 21st day of April, 1838, the defendants, with Walter Clarke and James T. Clarke, confessed judgment to the plaintiff "for the sum of \$1,083.55, with interest from the 10th of June, 1837, until paid, and costs of this suit, namely, \$147.58, and \$142.80, the costs in the Supreme Court, and the additional costs thereon, which sums were recovered by the said W. G. W. White against the said Joseph S. Clarke and Richard G. Briscoe, on the 11th of April, in the year of our Lord, 1838, by a decree of the Circuit Court of the District of Columbia, sitting as a Court of Equity, for Washington County aforesaid."

In this state of the case, *Mr. Marbury* and *Mr. Key*, for the complainant, moved for an attachment against the defendants for not bringing the money into court, according to the order of the 11th of April, 1828; and contended that the judgment thus confessed before the two justices, is not a *supersedeas*. That the order of the 11th of April is not a final decree upon which an execution could issue; it is a mere command to the defendants to perform the final decree of the 10th of June, 1837; and it is now too late to supersede that decree, because more than two months have expired since that decree was passed; and it was superseded by the appeal-bond until the affirmance of the cause in the Supreme Court, and cannot now be superseded by a confession of judgment.

Mr. Hoban, contrà, contended that the order of the 11th of April is a renewal of the decree of the 10th of June, 1837, and may now be superseded.

Mr. Key, for the complainant, in reply, contended that the Act of Assembly of Maryland of November, 1791, c. 67, does not apply to such a decree as this, which is a mere order to the defendant to obey a previous decree. That the act contemplated only ordinary decrees simply for the payment of money, and not a complicated decree to do particular acts, and also to pay money; the whole decree must be superseded, or no part of it.

The COURT (*THURSTON, J., contrà*), was of opinion that the confession of judgment was not a *supersedeas*; but refused to grant an attachment, saying that the complainant might have a *fiery facias*.

PETER LENOX'S EXECUTORS v. J. B. GORMAN *et al.*

To a declaration in debt upon a replevin-bond, setting forth the condition and the breaches, by not prosecuting the writ of replevin to effect, and by not returning the property, and by not paying the damages and costs; a plea, that the defendant hath performed, &c., all and singular the matters and things in the said condition mentioned, which he, according to the force, form, and effect of the same condition, ought to have observed, performed, &c., is bad upon general demurrer. Evidence that the landlord was indebted to the defendant at the time that the rent was due by the tenant, cannot be given under a plea of set-off.

DEBT on replevin-bond in the penalty of \$3,400, given by J. B. Gorman upon obtaining a writ of replevin, in his own name, for goods distrained by Peter Lenox for rent due by Mrs. Arguelles, upon which writ judgment was rendered for Mr. Lenox, in 1837, upon the pleas of *non tenuit, non dimisit*, and no rent arrear; the jury having found the issues for the landlord, and one cent damages, and that the rent arrear was \$978.30, and the value of the goods distrained \$1,198.

Lenox's Executors v. Gorman.

The declaration upon the replevin-bond set forth the condition, and alleged, as breaches thereof, that the said Gorman did not prosecute his writ of replevin with effect; and did not return the goods, nor pay the charges and costs.

The defendants pleaded "that the said J. B. Gorman hath well and truly observed, performed, fulfilled, and kept, all and singular the matters and things, in the condition of the said writing obligatory mentioned and contained, which he, according to the force, form, and effect, of the same condition, ought to have observed, performed, fulfilled, and kept."

To this plea the plaintiffs demurred generally.

The defendants also pleaded, by way of set-off, that at the time of the alleged breaches of the condition of the bond, the said Peter Lenox, in his lifetime, was indebted to the said Gorman, in the sum of \$1,238.96, for matters properly chargeable in account, and for goods sold and delivered, and for money lent and advanced, all which still remains due; and that he is willing to set off as much thereof as the damages for the said supposed breaches may amount to.

To this plea the plaintiffs replied, "that the said Peter Lenox, in his lifetime did not undertake and promise in manner and form as the defendants have above pleaded, and of this they put themselves upon the country," &c. They also replied the statute of limitations.

Upon the demurrer to the plea of general performance, the COURT (THRUSTON, J., absent,) rendered a peremptory judgment for the debt in the declaration mentioned, to be released on the payment of the rent arrear, with interest and costs.

Upon the trial of the issues upon the set-off, the Court refused to permit evidence to be given of work and labor, &c., done by the said Gorman for the said Peter Lenox.

CRANCH, C. J., doubting whether the plaintiffs ought not to have demurred; but inclining to think that the issue, whether Lenox was indebted to Gorman at the time of Lenox's judgment for the rent due by Mrs. Arguelles, was an immaterial issue, and, therefore, no evidence should be permitted to be given upon it. Besides, the evidence was offered for the purpose of showing that no rent arrear was actually due from Mrs. Arguelles, as charged in the avowry, in the action of replevin, and found by the jury in that case.

The defendants prayed the Court to instruct the jury, that the plaintiffs were not entitled to a verdict in this case, for the amount of the rent arrear found by the jury in the action of replevin.

But the COURT refused to give the instruction.

The defendants took their bills of exceptions.

Verdict for the plaintiff, \$1,088.25.

Messrs. Brent & Brent, for the plaintiffs; *Messrs. Key and Hoban*, for the defendants.

The defendant's counsel moved in arrest of judgment :

1. "Because the plaintiffs are not entitled to a judgment on the verdict for the amount thereof; it being the amount of rent arrear found by the former jury in the former record; and there being no breach in the declaration stating that as the plaintiff's damage."

2. "Because the plaintiffs are not entitled to judgment on the demurrer for any thing but the damages and costs stated in the declaration as the breach of the condition of the bond, for which this action is brought."

3. "Because the plaintiffs, under the breaches set out in their declaration, are not entitled to the amount of rent in arrear, as found in the record given in evidence, but only to the damages and costs stated in the former record; neither on the verdict now rendered nor on the demurrer."

4. "Because the Court cannot ascertain the damages on the demurrer; but the same should have been done by a jury."

But the COURT overruled the motion; and rendered judgment for the penalty of the bond and \$3,000 damages; the said debt and damages to be released on the payment of \$1,088.25 and costs.

W. H. FRESH v. RIAH GILSON *et. al.*

The plaintiff cannot recover in an action of *indebitatus assumpsit*, for work and labor done under a contract under seal, unless the whole work has been done according to the contract; nor in an action against three defendants, upon a contract under the seal of one defendant only; unless the contract was made for the benefit of all the defendants, and the work performed according to the contract.

THE defendants had a contract with the Chesapeake and Ohio Canal Company for making culvert No. 116, in section No. 150; and the plaintiff, by a written contract under his seal and that of Gilson, one of the defendants, undertook to do the work, by the 4th of July, 1833, at a less price as to part of the work, and at the contract price as to the residue. This contract was given in evidence by the plaintiff. The defendants gave evidence tending to show that, according to a stipulation in that contract, Midler, one of the defendants, (not Gilson, who had signed and sealed the contract,) not being satisfied with the progress of the work, some time in July, 1833, came and declared the plaintiff's contract to be abandoned, and proceeded to finish the work before the 21st of December, 1833. The defendants attempted to prove

the amount which they had been obliged to pay to complete the contract; the vouchers produced were disputed at every step, and the plaintiff took four bills of exception to the admission of evidence.

The COURT, at the motion of *Mr. Bradley*, the defendant's counsel, instructed the jury, that if they should find from the evidence that there was an agreement under seal between the plaintiff and the defendants for the execution of the work and labor for which this action is brought, the plaintiff is not entitled to recover.

CRANCH, C. J., would have added, "unless they should also be satisfied by the evidence that the plaintiff had performed the work according to his agreement."

The COURT also instructed the jury, at the instance of the defendant's counsel, that if they should find from the evidence, that the plaintiff performed the work and labor for which this action is brought, under a sealed agreement between the plaintiff and Riah Gilson, the plaintiff is not entitled to recover in this action.

CRANCH, C. J., would have added, "unless they should be satisfied by the evidence, that the plaintiff had done the work according to the written contract; and that the contract was made by Gilson for the benefit of all the defendants and with their consent, and that they recognized it."

To these instructions the plaintiff also excepted, and took his bills of exception.

Messrs. Brent & Brent, for the plaintiff; *Mr. Bradley*, for the defendants.

Verdict and judgment for defendants.

Reversed by the Supreme Court of the United States, January term, 1842.

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1839, AT WASHINGTON.

ELIZA ELLEN MOCKBEE *et al.* v. ANNA MARIA UPPERMAN, and
the Heirs of Benjamin B. Myers.

Infants whose property has been sold for taxes due to the Corporation of Washington, have a right to redeem at any time within one year after they have arrived at full age.

BILL IN EQUITY by infants to redeem property in Washington sold for taxes, and to cancel the deed made by the Corporation of Washington to the purchaser at the tax-sale; or to obtain a reconveyance of the property to the infants.

The complainants were the mother and two infant children; who claimed the south half of lot No. 9, in the square No. 293, in Washington, under a deed from James N. Edmonston to the mother in trust for the two children during their joint lives and the life of the survivor of them, with remainder to the mother in fee.

The property was assessed in the name of Sarah Edmonston and Benjamin B. Myers; and more than two years' taxes being due thereon, it was advertised as their property and sold in June, 1832, by the collector to the said Benjamin B. Myers, who paid the amount of the taxes due thereon, namely, (\$17.78,) but died without obtaining a deed from the Mayor of Washington, according to the provisions of the charter; who on the 8th of July, 1834, made a deed to "the heirs of Benjamin B. Myers, deceased," without naming them.

By the tenth section of the charter of 1820, it is provided, "That minors, mortgagees, or others having equitable interests in real property, which property shall be sold for taxes as aforesaid, shall be allowed one year after such minors coming to, or being of, full age, or after such mortgagees, and others having equitable interests, obtaining the possession of, or a decree for the sale of, such property, to redeem the property, so sold, from the purchaser or purchasers, his, her, or their assigns, on paying the amount of

 Thomas v. Mackall.

purchase-money so paid therefor, with ten per cent. interest thereon as aforesaid, and all the taxes that have been paid thereon by the purchaser or his assigns, between the day of sale and the period of such redemption, with ten per cent. interest on the amount of such taxes, and also the full value of the improvements which may have been made or erected on such property by the purchaser or his assigns, while the same was in his or their possession."

One of the children had arrived at full age when the bill was filed, but the year had not elapsed which was allowed for redemption. The other child was still under age.

The COURT was of opinion that they were in time to redeem, and decreed accordingly.

JAMES THOMAS v. BROOKE MACKALL.

Neither the complainant nor his wife can be examined as a witness against the defendant in a bill for injunction to restrain the defendant from removing from the District of Columbia the plaintiff's slave who had been sold by the plaintiff to the defendant for a term of years only, at the expiration of which term the slave is to be free.

BILL IN EQUITY to restrain the defendant from removing the plaintiff's female slave from the District of Columbia; the slave having been sold by the plaintiff to the defendant for a term of years only, after which she was to be free, although not yet manumitted, and having two or three years yet to serve the defendant; the complainant having the reversionary right to the slave in himself, for the purpose of manumitting her.

Mr. Bradley, for the complainant, asked leave to take the deposition of the complainant and his wife, to be read at the hearing; contending that the complainant was merely acting as the *prochein ami* of the slave.

Mr. R. J. Brent, *contrà*, objected that the complainant was interested; having the reversionary right to the services of the slave; and also liable for costs and damages upon the injunction bond, in case the decree should be against him; and cited *Medley v. Jones*, 5 Mun. 98.

Mr. Bradley, in reply, contended, that a *prochein ami* is a competent witness, although liable for costs; or new security for costs may be given; and he will be called to swear against his interest, for he will prove that the slave will be entitled to her freedom at the expiration of the present term of service. He cited Wheeler's Law of Slavery, 184; *Lupton v. Lupton*, 2 Johns. Ch. Ca. 626; Starkie on Ev. part 4, p. 785, note; and *Goss v. Tracy*, 1 P. Wil-

liams, 287; *Mullany v. Dillon*, 1 B. & P. 413; *Dixon v. Parker*, 2 Ves. 222; *Murray v. Shadwell*, 2 Ves. & B. 401; *Lee v. Atkinson*, 2 Cox, 413; *Rogers v. Whittington*, 1 Swanst. 39.

But the COURT (THRUSTON, J., absent,) refused to permit the complainant or his wife to be examined as a witness.

FRANCIS MARKOE, JR., v. R. S. COXE *et al.*

A purchaser at a trustee's sale for money payable by instalments with interest from the day of sale, and with leave to take immediate possession, is bound to pay interest from that day, although he should decline to take possession until some months thereafter, while investigating the title and waiting for the vendor to clear it; but is entitled to the rents and profits accruing during the same time.

If the purchaser pays the money into court under the order of the judge granting the injunction to stay a resale by the trustee, the interest ceases to run from the time of such payment.

BILL IN EQUITY to stay a resale of the property sold by the defendant to the plaintiff under a deed of trust from Timothy Caldwell, and to obtain a clear title.

This cause came before the Court upon a motion to dissolve the injunction which had been granted by a judge of this Court, upon condition of paying the purchase-money, and so much of the interest as the plaintiff admitted to be due, namely, from the day on which he took possession of the property, until the payment into court; which was done accordingly.

The facts upon the bill, and answer of the defendant Coxe, appeared to be as follows:

On the 8th of December, 1837, the defendant, as trustee under a deed of trust from Timothy Caldwell to secure a debt due to Mr. Joseph Walter, sold a house and lot in square 78, in the city of Washington, to the plaintiff, at public auction, for \$4,075, one fourth to be paid in cash and the residue in six, twelve, and eighteen months, on interest; and the purchaser to be entitled to immediate possession. That before the sale the plaintiff inquired of the defendant as to the title, and was informed by him that he could give no warranty as to title; but that as a friend he had no hesitation in saying that he believed the title good, and that with the exception of an incumbrance to Mr. Fischer of Philadelphia, he was not aware of any incumbrance, other than that under which this sale was made. That the debt due to Mrs. Fischer should be paid out of the purchase-money, and that the purchaser might pay it, and would be allowed credit therefor.

The deed of trust from Caldwell to Mr. Coxe, was acknowledged in Philadelphia before Mr. Justice Baldwin of the Supreme Court of the United States, who was also *ex officio* a judge of the

Circuit Court of the United States for the Eastern District of Pennsylvania; but there was no certificate of the clerk of that court, that he was such judge at the time of the execution and acknowledgment of the deed, as required by the Act of Congress of the 31st of May, 1832, [4 Stat. at Large, 520,] "for quieting possessions, enrolling conveyances," &c., "within the District of Columbia." The deed had been duly enrolled within the six months allowed by law, and the six months had now expired. There was no written evidence of a request by Mr. Walker to Mr. Coxe to make the sale under the deed of trust, or to receive the purchase-money.

Under these circumstances, Mr. Markoe declined to take possession, or intermeddle with the property until the 8th of August, 1838, when Mr. Coxe invited the plaintiff to take possession of the property, promising that it should not injure his rights; upon which the plaintiff took possession, supposing it to be understood that no back interest would be claimed. Mr. Coxe claimed interest upon the purchase-money from the day of sale. Some rent accrued in the meantime, a part of which had been expended in repairs, and the residue had been received by Mr. Caldwell. Mr. Coxe threatened to resell the property, unless the purchase-money and full interest should be paid up; and to prevent such resale, the injunction was granted.

CRANCH, C. J. The defendant, Mr. Coxe, having answered the bill, has moved the Court to dissolve the injunction, which restrains him from reselling the property for the default of the plaintiff in not paying the instalments due, and the interest thereon from the 8th of December, 1837, according to the terms of the sale.

The plaintiff contends that, as he did not take possession of the property until the 8th of August, 1838, he is not bound to pay interest for any period before that day.

The sale was made on the 8th day of December, 1837, and the purchaser was to be entitled to immediate possession. The plaintiff admits that he declined to take possession.

The plaintiff's counsel cited the cases of *Blount v. Blount*, 3 Atk. 636, and *Fludyer v. Cocker*, 12 Ves. 25, to show that interest is not payable upon purchase-money until the purchaser is in possession. But those cases were decided merely upon the general principles of equity. There had been no express promise to pay interest from the day of sale, as there was in the present case. If there had been, there can be no doubt that the chancellor would have decided according to the contract of the parties.

The plaintiff does not seek to be relieved from the contract, but contends that he has a right to be relieved from the interest while he was investigating the title, &c.

Semmes v. McKnight.

I see nothing, in his own statement of his case, which can justify the Court in rescinding the contract in part, and not in the whole; in permitting the plaintiff to avail himself of the benefit of the contract without taking upon himself the whole of its burdens. It was not the defendant's fault, that the plaintiff did not take possession of the property immediately after the sale.

I think the plaintiff must pay the interest from the 8th of December, 1837, the date of the sale to the time of payment. But the plaintiff has a right to have the title cleared from the objections which have been made to the deed from the defendant Caldwell to the defendant Coxe, and from want of evidence that the sale was made at the request of the defendant Walter, and from the want of a release of Mrs. Fischer's mortgage, and therefore the injunction must be continued until those things are done; and the motion to dissolve it must be overruled.

MORSELL, J., concurred in overruling the motion to dissolve the injunction; but was of opinion that the plaintiff was not bound to pay interest until he took possession of the property.

THRUSTON, J., absent.

This cause came to final hearing at November term, 1839, when the COURT (MORSELL, J., *contra*,) was of opinion, and so decreed, that the plaintiff was liable for interest on the purchase-money from the day of sale, until it was brought into Court, but not afterwards; and that the plaintiff was entitled to the rents and profits accruing between the day of sale and his taking possession, (deducting what was expended in repairs;) and his costs to be deducted from the purchase-money and interest.

A trustee was appointed to convey to the plaintiff all the rights of all the other parties to the suit; and the injunction was made perpetual.

BASIL SEMMES v. GEORGE B. MCKNIGHT.

A lease for twenty years, not acknowledged or recorded, is not a lease at will; and the landlord may distrain for rent, although the original lessee should not have been in possession for several years next before the distress, or should have died. The tenancy does not cease by the tenant's setting up an adverse claim more than six months before the distress.

A *bonâ fide* purchaser at a tax-sale without collusion with the tenant, may enter under his purchase, and convey to a third person, who will not thereby become tenant of the original landlord; but if there be collusion between the tenant and the purchaser, to suffer the taxes, which it was the duty of the tenant to pay, to remain unpaid, and thereby to cause a sale by the collector of taxes, so as to enable the purchaser to buy in the property for the benefit of the tenant; the title of the property is not changed by such tax-sale, and the tenant remains tenant to the original landlord.

The assessment and advertisement of property in a wrong name, does not make the tax-sale void, since the Act of May 26, 1824.

If an improvement extend over divers lots, personal property found on any of those lots is liable for the taxes on all the lots so improved.

Under a reservation of twenty dollars rent "clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent; although there be a clause of reëntry for the non-payment of the rent.

REPLEVIN; avowry for \$90 rent arrear, under an indenture of lease from W. Prout to John Chalmers, Jr., dated December 1, 1816, for twenty years, of the whole square, No. 876, in the city of Washington, at \$20 a year, clear of "all taxes, charges, rates, or assessments whatsoever, which may become due on said piece of ground," with a clause of reëntry, "if the said yearly rent of \$20, hereby reserved, or any part thereof, shall be unpaid at the expiration of sixty days after the same shall become due, and not sufficient effects on the premises whereon to levy the said rent."

This lease was not acknowledged or recorded. The avowry set forth the lease, the death of Mr. Prout, seized of the rent and the reversion in fee, the descent to his heirs as tenants in common, their entry and partition, and the allotment of the square No. 876, with the rent, to the wife of the defendant, one of the co-heirs; the seizin of the defendant and wife, and the non-payment of five years' rent ending on the 1st of December, 1835.

The plaintiff pleaded *non tenuit, non dimisit*, and no rent arrear, upon which pleas issues were joined.

Evidence was offered at the trial to show that Joel Cruttenden was the agent of Chalmers for paying the rent to Mr. Prout; that he suffered the taxes to remain unpaid, whereby the property was sold, in December, 1827, and bought in by Mr. Cruttenden, who, however, continued to pay the rent to Mr. Prout, until 1830. That Mr. Prout died, and Mr. Cruttenden, in 1835, obtained a deed from the Mayor of Washington, in confirmation of his purchase at the tax-sale, and in the same year, conveyed the same to the plaintiff. That Chalmers died in 1834.

The plaintiff claimed under the tax-sale to Mr. Cruttenden. *Mr. Bradley*, for the defendant, contended that that sale was void by the collusion between Mr. Cruttenden and Mr. Chalmers, and that the tenancy still continued, notwithstanding the sale.

Mr. R. J. Brent, for the plaintiff, prayed the Court to instruct the jury that the lease from Prout to Chalmers only operated as a lease at will, and that if they should believe from the evidence that Chalmers was not in possession, either by himself or by his tenant, for several years before the distress; or if they find that Chalmers was dead in 1834, then the plaintiff is entitled to recover.

But the Court refused to give the instruction. They also refused to instruct the jury that if they should find that more than

six months before the distress laid, the plaintiff held adversely to the claim of the defendant, and that such adverse claim was known to the heirs of the said W. Prout, or to their agent, or to the defendant, then the plaintiff is entitled to recover.

Mr. Brent then prayed the Court to instruct the jury, that if they should be of opinion, from the evidence, that the said Joel Cruttenden fairly and *bonâ fide* purchased the property at a tax-sale made by the corporation in 1827, without any collusion with the said Chalmers, the tenant, who was bound to pay the taxes, and that when he entered upon the same, he did so in virtue of that purchase, and not as tenant of the said Chalmers, or of the heirs of Prout, under whom the defendant claims; and that afterwards, and while he so possessed the property, claiming it in fee-simple, in virtue of the said sale, he put the plaintiff in possession under a contract to convey the same to him, and did actually convey the same to the said plaintiff after the corporation had made the deed to the said Cruttenden, and about eight months before the distress was levied, then the plaintiff is entitled to recover in this action.

Which instruction the Court gave; but also, at the prayer of *Mr. Bradley*, gave the following instruction, namely, that if from the evidence, the jury shall find that the said Chalmers entered into possession of the premises under the said lease from W. Prout, and remained and continued in such possession up to, and after the time of the said tax-sale, in 1827, and that the said Joel Cruttenden, as the agent of the said Chalmers, paid rent to the heirs of the said Prout, which had accrued after such tax-sale; or that he was such agent before the said tax-sale, and did not then set up, or pretend to any title to the said premises under the said sale, and that the said Cruttenden had notice of the terms of the said lease from Prout to Chalmers, and that the said Chalmers was thereby bound to pay the taxes on the property, then the said Cruttenden did not acquire any title to the said premises by reason of the said tax-sale; and the said Chalmers continued the tenant of the said premises, and the plaintiff is not entitled to recover.

Mr. Bradley prayed the Court to instruct the jury, that if they found from the evidence, that the premises were assessed in the name of "John Chalmers, or the Bank of Washington," the assessment was not in compliance with the terms of the charter, and the tax-sale in 1827 was, for that reason, void. But the Court, upon considering the Act of May 26, 1824, § 2, supplementary to the charter of 1820, refused to give the instruction.

Mr. Brent then prayed the Court to instruct the jury, that after the 1st of December, 1823, (namely, after the expiration of the first seven years of the lease,) the lease operated only as a lease

Archer v. Poor.

from year to year ; and if they find, from the evidence, that the said Chalmers died in the year 1834 ; and that the plaintiff from that time and before, has been in possession of the premises, claiming adversely to the defendant, then there was no tenancy subsisting at the time of the distress laid, and the plaintiff is entitled to recover.

But the Court refused to give the instruction ; the defendant having offered evidence that the square No. 876, the premises in question, contained 13 lots, and that a rope-walk was erected thereon, extending across several lots, and that upon one of those lots there was personal property enough, at the time of the tax-sale to pay the taxes.

Mr. Brent prayed the Court to instruct the jury, in effect, that goods, found upon one of the lots, are not liable for the taxes upon the other lots ; but the Court refused to give the instruction, and said ; the words of the charter of 1820, § 10, are, " Provided that no sale shall be made of any improved property, whereon there is personal property sufficient to pay the said taxes."

If an improvement extend over divers lots, such lots are improved property ; and personal property found on any part of that improved property is liable for the taxes due thereon.

The Court also decided, that under a reservation of "\$20 a year rent clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent, although the lease contain a clause of reëntry " in case the said rent of \$20, or any part thereof, should remain unpaid for 60 days," &c.

Verdict for the defendant.

W. ARCHER v. M. POOR.

An acknowledgment of a claim is not sufficient to take a case out of the statute of limitations.

ASSUMPSIT for use and occupation.

To take the case out of the statute of limitations, the plaintiff offered in evidence the defendant's letter to the Secretary of the Navy, in which he says, " I could have availed myself of the insolvent laws of the District, but preferred paying all debts as soon as possible, not omitting *Mr. Archer's* claim."

The COURT, (*THRUSTON, J.*, absent,) said it was not a sufficient acknowledgment to take the case out of the statute. See *Wetzel Bussard*, 11 Wheat. 309, and *Bank of the United States v. Moore*, 6 Peters, 93.

Mr. Dermott, for plaintiff, *Mr. Bradley*, for defendant.

SAMUEL MILLER v. JONATHAN ELLIOT.

It is a condition annexed to the title of every house-lot in the city of Washington, that when the proprietor builds a partition-wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both ; and that any person who shall afterwards use the partition-wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.

It is the duty of the City Surveyor to attend, when requested, and examine the foundation or walls of any house to be erected, when the same shall be level with the street or surface of the ground, for the purpose of adjusting the line of the front of such building to the line of the street, and correctly placing the party-wall on the line of division between that and the adjoining lot ; and his certificate is evidence, and binding on the parties interested ; but it is not necessary to the plaintiff's right of action for half the value of the wall, that it should have been so adjusted by the surveyor ; or that the walls should be of the thickness required by the third article of the commissioners' regulations of the 20th of July, 1795.

The value of half the wall may be recovered in an action upon the case in *assumpsit*

ASSUMPSIT for money paid, laid out, and expended, for the defendant's use and at his request ; to recover one half of the costs of so much of the partition-wall erected by the plaintiff as was used by the defendant in building his house on the adjoining lot.

Verdict for the plaintiff, subject to the opinion of the Court, whether the plaintiff had a right to place half of his partition-wall on the lot of the defendant, and whether the defendant is liable to the plaintiff for half the cost of so much of the wall as the defendant used in building his house adjoining it.

The case was submitted to the Court upon notes of argument by the counsel, *Mr. Addison*, for the plaintiff, and *Mr. Morfit*, for the defendant.

CRANCH, C. J., delivered the opinion of the Court.

The original proprietors of the lands now composing the city of Washington, by deeds dated about the 29th of June, 1791, conveyed their lands to Thomas Beall and John M. Gantt, in trust, among other things, to be laid out for a federal city, with such streets, squares, parcels, and lots, as the President of the United States should approve ; and that they should convey to the commissioners of the city, for the use of the United States, forever, all the streets, &c., and that the residue of the lots should be equally divided between the United States and the original proprietors ; and that the trustees should convey to the original proprietors the lots assigned to them in the division ; and that the residue should be sold and conveyed to the respective purchasers. But such conveyances, as well to the original proprietors, as to the respective purchasers, were to be "on, and subject to, such terms and conditions as shall be thought reasonable by the President for the time being, for regulating the materials and

Miller v. Elliot.

manner of the buildings and improvements on the lots generally, in the said city, or in particular streets, or parts thereof, for common convenience, safety, and order; provided such terms and conditions be declared before the sales of any of the said lots, under the direction of the President."

Under this provision of the trust-deeds, the President of the United States, on the 17th of October, 1791, before the sale of any of the public lots, declared certain "terms and conditions for regulating the materials and the manner of buildings and improvements on the lots in the city of Washington."

The fourth of these terms is, "That the person or persons appointed by the commissioners to superintend the buildings, may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof; which foundations shall be laid equally upon the lands of the persons between whom such party-walls are to be built; and shall be of the breadth and thickness determined by such person proper; and the first builder shall be reimbursed one moiety of the charge of such party-wall, or so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use, or break into the wall; the charge, or value thereof, to be set by the person or persons so appointed by the commissioners."

It is, therefore, a condition annexed to the title of every house-lot in the city of Washington, that when the proprietor builds a partition-wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both; and that any person who shall afterward use the partition-wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.

By the charter of 1820, § 7, the power is given to the Corporation of Washington, "to regulate, with the approbation of the President of the United States, the manner of erecting, and the materials to be used in the erection of houses;" and by § 8, "to regulate party, and other walls and fences."

By the by-law of March 30, 1822, (Rothwell's City Laws, 142,) the corporation reenacted the building regulations of the 17th of October, 1791, and those of the commissioners of July 7, 1794, originally made under the authority of the Maryland Act of 1791, c. 45, except so far as modified by the proclamation of President Monroe, of January 14, 1818, which modification does not affect the present case.

The Surveyor of the city of Washington, was an officer appointed by the commissioners during their existence, and afterwards by the superintendent during his existence, and afterward

by the commissioner of the public buildings, and finally by the Corporation of Washington, under the by-law of August 13, 1828.

The office of Surveyor of the city is recognized, and his fees are regulated by several Acts of Congress, namely, March 3, 1803, Burch, 245, [2 Stat. at Large, 235]; March 27, 1804, Id. 246, [2 Stat. at Large, 297]; and January 12, 1809, Davis's Laws, 189; [2 Stat. at Large, 511, Burch, 267, 268, 269.

By the fifth section of the Act of January, 12, 1809, it is enacted, "That it shall be the duty of the surveyor to attend, when requested, and examine the foundation or walls of any house to be erected, when the same shall be level with the street, or surface of the ground, for the purpose of adjusting the line of the front of such building to the line of the street, and correctly placing the party-wall on the line of division between that and the adjoining lot; and his certificate of the fact shall be admitted as evidence, and binding on the parties interested."

The same thing is enacted *totidem verbis* in the by-law of August 13, 1828, authorizing the appointment of a surveyor, &c.

This surveyor is the officer who is to perform the duties required by the second and fourth articles of the regulations of the 17th of October, 1791; but by the Act of January 12, 1809, as well as by the by-law, he is only to perform them when required, and when the wall shall be level with the street, or the surface of the ground.

This act modifies the second article of the regulations in that respect, and dispenses with the necessity of applying to the surveyor. It is no valid objection, therefore, to the plaintiff's right of recovery, that he did not apply to the surveyor to adjust the party-wall, if such was the case. But that fact does not appear. It might, for aught that appears, have been, that the surveyor did so adjust it, as well as the front walls; or that the party-wall may have been laid with the consent of the defendant.

It is also objected by the defendant that the walls were not of the thickness required by the third article of the commissioners of July 20, 1795, made under the Act of Maryland, 1791, c. 45, entitled "An Act concerning the territory of Columbia."

But a compliance with that regulation, is not a condition preliminary to the plaintiff's right of action for half of the cost of the party-wall. The plaintiff may possibly have subjected himself to the penalty of \$20, but that penalty does not enure to the benefit of the defendant, and is not a bar to the plaintiff's right of action.

It is also moved, in arrest of judgment, that the action should have been debt, and not case.

Linthicum v. Remington.

But there is nothing in the record to show that case or assumption was not the proper form of action.

Let the judgment be entered up according to the verdict.¹

OTHO M. LINTHICUM v. WILLIAM REMINGTON.

A judgment by default at the imparlance term in the county of Washington, is regular, the rule to plead having expired in the preceding vacation.

The marshal may amend his return of a *fiery facias* after the return day, according to the truth of the case, by stating the sale, &c., from his sales-book.

The marshal's sales-book is evidence of the sale.

The plaintiff having offered in evidence a deed from Z. M. O. to the defendant to show that plaintiff and defendant both claimed title under the said Z. M. O., and at the same time stating that he intended to show that the deed was fraudulent and void as against the plaintiff, is not thereby precluded from proving the fraud.

When evidence has been given on both sides, the Court will not instruct the jury that the plaintiff cannot recover upon the evidence offered on his part.

The Court will not permit counsel to testify as to facts disclosed by his client, upon an application to him as a conveyancer to draw a deed.

The grantee of a deed alleged to be fraudulent, is a competent witness in support of the deed, in an action against the person to whom he has conveyed the property, upon receiving from him a release, &c.

EJECTMENT for part of lot No. 153, in Beatty & Hawkins's Addition to Georgetown.

The plaintiff claimed under a sale by the marshal, upon a *fiery facias* against Z. M. Offutt.

The defendant claimed under a deed from the said Z. M. Offutt to James Remington, dated April 18, 1835, and from James Remington to the defendant, dated October 16, 1835.

The plaintiff offered in evidence the record and proceedings in three cases and three writs of *fiery facias* against Offutt, which had not then been returned to the clerk's office, with the indorsement thereon, and the schedule of property upon which they were levied, which were produced by the marshal. And he also offered in evidence the private book of entries, kept by the marshal of his official sales, &c., in which is an entry of the sale of the property for which this suit is brought, made on the 13th of January, 1838, by his clerk, employed in his office, but who was not a deputy-marshal, and offered to prove that the said entry was truly copied from an original memorandum made by the deputy-

¹ See the Act of July 12, 1809, § 4, which applies to two cases only. 1. Where a house is built on a subdivision of a lot or square before the surveyor shall have measured the whole front, &c. 2. Where the house was built before the date of the act, (12th July, 1809.) That section, therefore, does not touch this case of *Miller v. Elliot*.

marshal at the time of sale, which original paper is lost, and that the said entry was made in the said book by the said clerk according to the usage and practice of the said marshal's office. And the plaintiff further offered in evidence a written return of the said writs of *feri facias* by the marshal, stating the sale of the property to the plaintiff, which return was not written or made out until after the jury was impanelled in this cause; and the plaintiff prayed the Court to authorize the marshal to make the said return. To the admissibility of all which evidence, and to the granting of the said prayer the defendant objected; but the COURT overruled the said objection, and permitted the said evidence to be given by the plaintiff, and the said return to be made by the marshal. To which the defendant took a bill of exceptions.

Mr. R. J. Brent, for the defendant, contended that the judgments were erroneous, because they were rendered at the imparlance term, and the defendant had, by the practice of this Court, (he contended,) the whole term to plead in.

But the COURT (THRUSTON, J., absent,) overruled the objection, 1st. Because no error in the judgments can affect the sale under the *feri facias*; and secondly, because the rule to plead had expired in the vacation preceding the imparlance term.

Mr. Brent contended that the marshal could not amend his return during the trial; and cited 2 Starkie, 520, part iv.; *Clarke v. Belmear*, 1 Gill & Johns. 444; *Barney v. Paterson*, 6 Har. & Johns. 205; *Berry v. Griffith*, 2 Id. 337.

The counsel for the plaintiff, in opening his case, stated to the jury that the plaintiff claimed title to the premises in question under a sale by the marshal, under a writ of *feri facias* at the suit of O. M. Linthicum against Z. M. Offutt; and that the defendant claimed title to the same premises, under a conveyance from the said Offutt to the defendant, which would be proved to be fraudulent and void as against the plaintiff; and the counsel for the defendant having, in his opening of his cause stated to the jury, that the defendant did claim title under the said conveyance from Offutt to Remington, and the plaintiff having offered the evidence aforesaid, now, for the purpose of showing that the said defendant claimed title under Offutt, and preparatory to impeaching the same for fraud, gave in evidence the deed from Offutt to James Remington; and the deed from James Remington to William Remington the defendant, and then offered evidence to prove that the said deeds were fraudulent and void as against the plaintiff; to the admissibility of which evidence the defendant objected, but the Court overruled the objection, and the defendant took his bill of exceptions.

M'Coun v. Lay.

The defendant having given a release to the said James Remington, offered him as a witness to support the validity of the deed from his brother-in-law Offutt to him, and from him to his father the defendant, which were alleged to be fraudulent.

And the COURT (CRANCH, C. J., doubting,) permitted him to be sworn and examined as a witness for the defendant.

Mr. Coxe, for the plaintiff, offered to examine *Mr. Marbury* as to facts stated to him by Offutt when he requested *Mr. Marbury* to draw a deed for him. *Mr. Marbury* was an attorney and counsellor of this Court, and often drew conveyances; and having been sworn on the *voir dire*, said that he considered the communication as having been made to him in his capacity of attorney, counsellor, and conveyancer.

The COURT refused to permit *Mr. Marbury* to state the facts which were communicated and the advice he gave to Offutt.

Mr. Coxe cited *Chirac v. Reinicker*, 11 Wheat. 294.

Verdict for plaintiff.

Judgment affirmed by the Supreme Court, January, 1840.

REBECCA M'COUN *et al.* v. RICHARD LAY.

The testatrix, having expressed an intention "to dispose of her worldly estate," and having two grandsons, devised one half of a lot of land to one of them and his heirs forever, and devised the other part of the lot, of the same size, to the other grandson, upon certain conditions, which he complied with; the Court held, that he took an estate in fee.

THIS cause was submitted to the Court upon a case stated. The question was whether, under the will of Susanna Fowler, her grandson Thomas John Fowler, under whom the defendant claimed, took an estate in fee, or for life.

The testatrix having two grandsons, and by her will expressing an intention to dispose of her "worldly estate," devised one half of a lot of land to her grandson Elisha Fowler and his heirs forever, and then says, "the other part of this lot, of the same size, I give and bequeathe to Thomas John Fowler, my grandson, on these conditions, to wit, that he shall marry, or proceed as his father shall think proper, or else he never shall inherit that which is described to him above; if he proceeds as above desired by me, Susanna Fowler, his father's order shall empower him to recover the same of the executor. This devisee complied with the conditions required, and the executor delivered to him possession of the premises.

Paul v. Kane.

If he took only a life estate, the judgment was to be rendered for the demandants. If an estate in fee, then for the defendant.

The COURT (MORSELL, J., absent,) was of opinion that Thomas John Fowler took an estate in fee.

Judgment for the defendant.

GABRIEL PAUL, Executor of Edward Coursault, v. ELIAS KANE.

Letters of administration, with the will annexed, granted in the District of Columbia while there was an executor acting under letters testamentary granted in Maryland, are void.

ASSUMPSIT for money had and received by the defendant for the use of the plaintiff, as executor of Edward Coursault, to recover from the defendant the sum of \$7,864.32 principal, and \$304.72 interest, received by the defendant from the Treasury of the United States, for indemnity for French spoliation of the testator's brig "Good Friends" and cargo, confiscated by the French government in 1810. This money was received by the defendant under letters of administration with the will annexed of the said Edward Coursault, granted by the Orphans' Court of the county of Washington in the District of Columbia, on the 28th of March, 1837. Edward Coursault died in August, 1814. His will was proved, and letters testamentary were granted to the plaintiff by the Orphans' Court of Baltimore county, in Maryland, on the 27th of August, 1814.

The memorial to the commissioners under the French treaty was presented by Madame Aglae Coursault in her own name, as executrix of the testator, stating that letters testamentary had been granted to her and to Gabriel Paul, (the plaintiff,) who were named executors in the will, and that whatever might be awarded would belong solely and exclusively to her, as executor of the testator.

Upon affidavit that she died in 1835, the Orphans' Court of Washington county granted the letters of administration to the defendant; the executor, Gabriel Paul, being still alive, and under the Act of Congress of the 24th of June, 1812, § 11, [2 Stat. at Large, 755,) competent to sue for and recover any claim in the District of Columbia, in the same manner as if the letters testamentary had been granted by the proper authority of the district.

Mr. Coxe, for the plaintiff, cited *Griffith v. Frazier*, 8 Cranch, 9, and *Childres v. Emory*, 8 Wheat. 671.

Mr. Key, for the defendant, cited 1 Petersdorf, 250; 1 Saund. 274, n. 3; 1 Chitty, Pl. 484; 2 Starkie, Ev. 548, 549, part 4; *Mansfield v. Marsh*, 2 Ld. Raym. 824; *Jones v. Jones*, 1 Bing. 249; *Hunt v. Stevens*, 3 Taunt. 113; Story's Conflict of Laws, 421, 430;

Leatherberry v. Radcliffe.

3 Bac. Ab. 38; *Stevens v. Gaylord*, 11 Mass. 256; *Langdon v. Potter*, Id. 313; 1 Wheeler, 236, 243; *Hughes v. McKinsley*, 5 Munroe, 40; *Henderson v. Clarke*, 4 Littell, Kentucky Rep. 277.

The COURT was of opinion that as there was an executor qualified and competent to sue, when the Orphans' Court of the county of Washington granted the letters of administration to the defendant, the latter were void.

Verdict for plaintiff. Judgment affirmed by the Supreme Court of the United States, at January term, 1840.

JESSEE LEATHERBERRY v. JOSEPH RADCLIFFE.

By the leave of the Court, if no objection be made by the opposite counsel, a party may withdraw from the files of the Court a deposition, in order to get the magistrate to amend his certificate according to the truth of the case; and such withdrawing and amending are not sufficient ground for rejecting the deposition.

If a deposition be taken *de bene esse*, because the witness is about to go out of the district and to a greater distance than one hundred miles from the place of trial, and he goes accordingly, it is not necessary that a subpoena should have issued to the marshal of this district, in order to enable the party to use the deposition; it is sufficient for him to prove to the satisfaction of the Court that the witness at the time of the trial is gone to a greater distance than one hundred miles from the place of trial, although the witness may have been within the district between the time of taking the deposition and the time of trial.

SLANDER. The plaintiff had taken a deposition under the Act of Congress, 1789, § 30, [1 Stat. at Large, 73,] before the Mayor of the city of Washington, to be used in this cause, and there being some informality in the certificate of the mayor, *Mr. R. J. Brent*, for the plaintiff, moved for leave to take the deposition from the files to get the certificate amended according to the truth of the case. The defendant's counsel did not object to the withdrawing of the deposition; which was done; and the certificate having been amended, the plaintiff's counsel offered to read it to the jury.

The defendant's counsel, *Mr. Marbury* and *Mr. Bradley*, objected, because the deposition, having been opened in court, must be considered as published, and cannot be amended in any respect.

They also objected that it was taken *de bene esse*, and no subpoena had been issued for the witness.

The witness, in his deposition, had stated that he lived more than one hundred miles from the place of trial; that he was about to leave the District of Columbia, and not to return before the time of trial; and this was also certified by the mayor as the reason for taking the deposition.

The plaintiff proved that the witness did leave the district im-

mediately after the taking of the deposition, and was not then, at the time of trial, within the jurisdiction of this Court.

The defendant then proved that the witness had returned to this district in the intermediate time, although not then in the district.

The defendant's counsel contended that it was necessary for the plaintiff to have taken out a subpoena to the marshal of this district, to entitle him to read the deposition, and cited *Penn v. Ingraham*, 2 Wash. C. C. R. 487, and *Barent v. Day*, 3 Wash. C. C. R. 243.

But the COURT overruled the objections, and permitted the deposition to be read, being of opinion that it was sufficient for the plaintiff to show, at the time of trial, that the witness was "gone" "to a greater distance than one hundred miles from the place of trial;" and that the return of a subpoena, *non est*, is only one means of making that fact appear to the satisfaction of the Court, but not the only means.

NOTE. The Court being bound by law to hold a session in Alexandria on the 6th of May, adjourned on Saturday, the 4th, to Monday, the 20th of May, and in the mean time sat nine days in Alexandria.

WILLIAM NOYES & CO. v. BRENT, Garnishee of E. Wilmarth, Jr.

A garnishee who received the goods of the defendant under a deed of trust, fraudulent in law as to some of the creditors, if he acted *bonâ fide*, is entitled to a reasonable compensation for his services in taking care of the goods, and selling them, whoever may be entitled to the net proceeds.

THIS was an attachment of the goods of Ezra Wilmarth, junior, in the hands of Mr. W. L. Brent, at the suit of William Noyes & Co. The garnishee held them under a deed to him by the defendant to secure a debt said to be due by the defendant to his father.

Mr. Marbury, for the plaintiffs, prayed the Court to instruct the jury, in effect, that if they should find the deed to the garnishee to be fraudulent in law as to these plaintiffs, the garnishee is not entitled to retain out of the fund in his hands, a compensation for services rendered by him as trustee under the deed while acting for the supposed creditor intended to be secured thereby.

The COURT, however, (THRUSTON, J. absent,) was of opinion that the garnishee, if he acted *bonâ fide*, was entitled to a reasonable compensation for his services in taking care of the goods, and selling them, whoever might be entitled to the net proceeds.

NEGRO WILLIAM KENNEDY v. CLARISSA PURNELL.

If a Maryland slave, with his consent, be carried to Virginia and kept there more than a year, by the person to whom he was hired or loaned in Maryland, without the consent of the owner of such slave, no time is limited within which the owner must use coercive measures for the recovery of the slave, and the omission to use such measures does not give him any title to his freedom; but the owner may reclaim the slave at any time.

If a Maryland slave, hired or loaned in Maryland, to a resident in Maryland, be carried, by the person to whom he is so hired or loaned, into Virginia, with a view to temporary residence only, and for necessary attendance, and to make a transient stay, and the slave, at the end of such transient stay, be carried or sent out of the State of Virginia again, the slave does not thereby become entitled to freedom, although all these acts were done with the consent of the owner.

PETITION for freedom on the ground that the petitioner was brought into Virginia, and kept therein one whole year together, contrary to the 2d section of the Virginia Act of the 17th of December, 1792, (P. P. 186.)

This fact was proved by the plaintiff's evidence. The defendant contended that the slave was, without the consent of the defendant, carried from Maryland into Virginia, by one J. Purnell Pendleton, to whom the slave had been loaned by the defendant; and, therefore, the case was not within the 2d section of the act, which was intended to punish the importation by the owner only. It was not intended that the owner should be punished for the unlawful act of another. The defendant contended also, that even if the importation had been with the defendant's consent, yet as Pendleton's residence in Virginia was only a "transient stay," the case was within the 4th section; and as the slave was sent out of Virginia again at the expiration of the transient stay, the case was taken out of the 2d section.

The Court, upon the trial, at the prayer of Mr. C. Coxe, the counsel for the defendant, gave the following instructions, namely,

1. That if the jury believe, from the evidence aforesaid, that the acts of the petitioner in going from Maryland into Virginia, as aforesaid, and remaining in the latter State, or in coming thence into this city, and remaining here, were without the consent of the defendant, then it was not necessary for the defendant, within any limited period, to use coercive measures for the recovery of the petitioner; and the omission of such coercive measures does not give the petitioner any title to his freedom.

2. That if the jury believe from the evidence aforesaid, that the petitioner, being the slave of the defendant and residing with her in Maryland, and with her consent, employed by the said Pendleton, as his servant, was, in the year 1834, carried by the said J. P. Pendleton, from the said State to the State of Virginia,

Nichols v. Burch, et al.

without the consent or authority, either previous or subsequent, of the defendant, then it is lawful for the defendant to reclaim the said petitioner, and carry him back to Maryland, at any time, and the defendant does not lose her title to the petitioner, by any delay in exercising that right.

3. That if the jury believe from the evidence aforesaid, that the petitioner, having become involved in a breach of the peace in the State of Maryland, in company with J. Purnell Pendleton, a citizen of the said State, and to avoid the consequences thereof, the said Pendleton fled to Virginia, carrying the petitioner with him, and there remained with the petitioner and employed him as his servant during two years and upwards, but never abandoned his residence in Maryland, and always entertained the purpose of returning to Maryland when he could do so with safety, and did not return the petitioner to Maryland only because he was afraid of the consequences thereof to the petitioner unless accompanied by the said Pendleton, who, at the end of the said time, sent the petitioner to the city of Washington, and afterwards himself returned to Maryland; that such acts of the said Pendleton, although the jury should believe they were with the consent of the defendant, do not entitle the petitioner to his freedom.

Mr. R. J. Brent, for the petitioner.

Mr. C. Cox, for the defendant.

Verdict for the defendant.

NEGRO LLOYD NICHOLS v. F. BURCH AND D. S. WATERS.

The Corporation of Washington have power to pass a by-law to prevent free colored persons from going at large through the city later than 10 o'clock P. M., without a pass, &c.

ASSAULT AND BATTERY, AND FALSE IMPRISONMENT.

The defendants, who were constables, justified the arrest and detention of the plaintiff, under the by-law of the Corporation of Washington, entitled "an act concerning free Negroes, Mulattoes, and Slaves," passed on the 31st of May, 1827, by the 6th section of which it is enacted, "That no free black, or mulatto person shall be allowed to go at large through the city of Washington, at a later hour than 10 o'clock at night, excepting such free black or mulatto have a pass from some justice of the peace, or respectable citizen, or be engaged in driving a cart, wagon, or other carriage, and any free person found offending against the provisions of this section, shall on conviction thereof before a justice of the peace, forfeit and pay a sum not exceeding \$10; and all such offenders

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may be confined in a lock-up-house, until the following morning ; provided however, that nothing herein contained shall be made to apply to any person of color passing peaceably through the streets to or from any meeting-house or place of worship ; nor to any person of color sent on an errand by the owner or employer of such person."

Messrs. Brent & Brent, for the plaintiff, contended, at the trial, that the Corporation of Washington had no power, under the charter, to pass such a by-law, applicable to persons of color, and not equally applicable to white persons. That the free blacks, by the general law of the land have as good a right to be out after 10 o'clock at night, as the whites, and that the by-law therefore was repugnant to the general law, and not authorized by any power given by the charter, nor necessary to the exercise of any of the powers expressly given.

In *Carey's case*, at November term, 1836, [*ante*, No. 13,] this Court decided that the corporation had no power to prevent a free colored person from selling perfumery ; "that the by-laws must not be repugnant to the general law of the land, further than such by-laws are justified by the express provisions of the charter ;" and that "the corporation has no power to restrain or prohibit the exercise of a common right, unless that power be expressly given, or be necessary to the exercise of a power expressly given."

Mr. Bradley, contra. The charter of 1820, § 8, gives the corporation power "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes." To prevent them from being out after a certain hour of the night is one of the easiest and surest means of restraining such meetings, and is necessary to the efficacious exercise of that power. This case is, therefore, quite different from that of *Carey* ; and is more like that of *Johnson*, at March term, 1838, (*ante*, 434,) under the by-law prohibiting the granting of tavern licenses to persons of color.

The COURT (*nem. con.*) was of opinion that the corporation had power to pass the by-law of 31st March, 1827, § 6, to prevent free persons of color from being out after 10 o'clock, P. M.

The plaintiff became nonsuit.

Ex parte WILLIAM BROWN.

Minors may be enlisted in the marine corps, as musicians, with the assent of their fathers ; and may be bound as apprentices to the drum-major, in behalf of the government.

Ex parte William Brown.

If a minor, aged nineteen years, enlists for the term of four years, *quære*, whether he is not entitled to his discharge at the age of twenty-one.

HABEAS CORPUS, to Colonel Henderson, of the marine corps, to bring up the body of William Brown, with the cause of his detention, &c.

The colonel returned, "as the cause for the detention of the said William Brown, his enlistment in the United States Marine Corps, according to law, as will appear by the accompanying documents, which the undersigned makes part of his return."

The documents were,

1. An enlistment in the following form: "I, William Brown, do acknowledge that I have voluntarily enlisted myself to serve four years in the Marine Corps of the United States, unless sooner discharged, upon the terms mentioned in the Act passed the 11th day of July, 1798, entitled 'An Act for establishing and organizing a Marine Corps;' and also the Act passed the 2d day of March, 1833, entitled 'An Act to improve the condition of the non-commissioned officers and privates of the Army and Marine Corps of the United States, and to prevent desertion;' and that I have had read to me the rules and articles of the army and navy against mutiny and desertion.

Witness my hand this 7th day of January, 1835.

In the presence of {	his
Jos. Cuvillier.	WILLIAM X BROWN."
	mark

"I, William Brown, do solemnly swear or affirm, as the case may be, that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever, and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the army and navy of the United States.

his
WILLIAM X BROWN."
mark

"Sworn before me, at Washington city, this 7th day of January, 1835.

EDWARD W. CLARK, J. P."

On the back of this enlistment was the "Size-roll," which, among other things, stated the age of the recruit to be fifteen years, and says he is "a boy bound to learn music."

2. An indenture of apprenticeship, stating that William Brown, with the consent of his father, William Brown, had voluntarily "put himself apprentice to drum-major Joseph Cuvillier, in behalf of government, to learn music art, trade, and mystery, and after

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the manner of an apprentice to serve him the said Joseph Cuvillier, or any appointed in his place, from the day of the date hereof, for and during and to the full end and term of six years next ensuing," with the usual covenants on the part of an apprentice. "And the said master shall use the utmost of his endeavors to teach, or cause to be taught or instructed the said apprentice, in the trade or mystery of a musician, and procure and provide for him sufficient meat, drink, clothing, washing, and lodging, fitting for an apprentice, during the said term of six years. He shall be further taught to read, write, and cypher as far as the rule of three."

This indenture is dated the 10th of January, 1835, three days after the enlistment, and was signed and sealed by the two Browns, father and son, and acknowledged before Edward W. Clark, justice of the peace.

3. The third document was a new enlistment of William Brown, on the 8th of January, 1839, for another term of four years. In the size-roll of which enlistment he is called a fifer, aged nineteen years. This enlistment extended two years beyond the time of his coming of age, and of course beyond the term of his apprenticeship.

Mr. R. J. Brent, for the prisoner, that the enlistment of the 7th of January, 1835, was illegal, because no law authorized the enlistment of minors in the marine corps, at that time. All the acts of Congress respecting enlistments are applicable to the army alone; and the marine corps is attached to the navy only, and constitutes no part of the military establishment of the United States, unless detached for service with the army. The acts relied on in favor of the enlistment, were those of the 16th of March, 1802, § 11, [2 Stat. at Large, 132,] 11th January, 1812, § 11, [Ibid. 671,] 20th January, 1813, § 5, [Ib. 791,] and 10th December, 1814, § 3, [3 Ib. 146.] None of these acts could affect the present case, because they were confined to enlistments in the army of the United States, of which the marine corps was not a part; and wholly under the Secretary of the Navy, and not under the Secretary of War.

But the objection to the second enlistment, under which the prisoner is now holden, stands on still stronger grounds. If the indenture signed by the father three days after the enlistment, can be considered as evidence of his consent "first had and obtained," to that enlistment, yet as the indenture was for six years only, and the second enlistment extended the term to eight years, the indenture is no evidence of the father's consent first had and obtained to this second enlistment, extending two years beyond the apprenticeship. The indenture itself, not having been acknowledged before two justices of the peace, or the Orphans'

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Court, and recorded in that Court, according to the Act of Maryland, 1793, c. 45, § 4, creates no personal obligation upon the apprentice, who was a minor, and incapable of contracting any such obligation except in the manner prescribed by law. It could only bind the father, who would be liable for damages if his son did not perform the services required by the indenture. If it stood alone on this contract, Cuvillier would have no right to retain the prisoner against his will. This contract can only be used as evidence of the father's consent to his son's enlistment; but it is no evidence of such consent to the second enlistment, which extended two years beyond the term of the indenture.

The Acts of January 31, 1809, § 2, [2 Stat. at Large, 514,] May 15, 1820, [3 Ib. 606,] and March 2, 1837, [5 Ib. 153,] apply only to the enlistment of boys for the navy, as seamen, not as mariners; and the last only authorizes the enlistment of such boys between the ages of thirteen and eighteen years, whereas this prisoner, at the time of his second enlistment, was nineteen years of age.

The COURT intimated that although the term of enlistment was for four years, being two years more than the time for which the father had given his consent, yet it would be a question whether the prisoner ought not to be discharged at the expiration of six years from the date of the contract with Cuvillier.

That they considered that contract as evidence of the father's consent that the son should be reënlisted on the 8th of January, 1839, and that although the law required all enlistments to be for a term of four years, the second enlistment was binding for at least two years of the time.

Upon the whole, the COURT (CRANCH, C. J., doubting, not having had time to examine the various acts of Congress touching the subject,) was of opinion that the enlistment was valid, and remanded the prisoner.

Mr. Key, for the respondent.

Messrs. Brent & Brent, for the prisoner.¹

¹ The acts of Congress touching this subject of the enlistment of Marines, are the following:

1775, November 10. Bioren's Ed. Laws United States, vol. 1, p. 620. Authorizing two battalions of marines to be raised; and that they be enlisted and commissioned to serve during the war.

1794, March 22. Vol. 2, p. 384, c. 188. "An Act to provide a naval armament." § 4. A forty-four gun frigate to have fifty marines. § 7. The pay of the seamen and marines to be fixed by the President. [1 Stat. at Large, 350.]

1796, May 30. Vol. 2, p. 556, c. 333; to fix the military establishment of the United States. § 6. Enlistment of recruits between eighteen and forty-six years of age. [1 Stat. at Large, 483.]

1797, July 1, vol. 3, p. 5, c. 7; "An Act providing a naval armament." § 1. Three frigates to be manned and employed. § 2. Two lieutenants of marines, for a forty-

Ex parte William Brown.

Upon a review of all the acts of Congress respecting the enlistment of recruits, there seems to have been no special provision for

four gun frigate. § 4. Fifty marines. § 6. Pay to be fixed by the President. § 8. Officers, non-commissioned officers, seamen, and marines, to be governed by the rules for the regulation of the navy. § 11. Marines, disabled entitled to pension. § 12. Marines in revenue cutters. [1 Stat. at Large, 523.]

1798, July 11, vol. 3, p. 95, c. 89; "for establishing and organizing a marine corps." § 1. "That in addition to the present military establishment, there shall be raised and organized a corps of marines, which shall consist of one major, &c., and 720 privates, including the marines, who have been enlisted or authorized to be raised for the naval armament." § 2. The President is authorized "to continue the enlistment of marines until the said corps shall be complete, and the enlistments which shall be made in virtue hereof, may be for the term of three years," &c. § 4. They are to "take the same oath, and shall be governed by the same rules and articles of war as are prescribed for the military establishment of the United States, and by the rules for the regulation of the navy heretofore, or which shall be established by law, according to the nature of the service in which they shall be employed. § 5. Marines who are, or shall be enlisted into the service of the United States, or into the army of the United States, are exempted from personal arrest for debt or contract. [1 Stat at Large, 594.]

1799, March 2, vol. 3, p. 267, c. 143. Augmenting the marine corps, by enlistment of 170 privates," &c. [1 Stat. at Large, 729.]

1800, April 23, vol. 3, p. 351, c. 187; for the better government of the navy, art. 29. Entry of seamen on the ship's books; date of his enlistment, &c. [2 Stat. at Large, 45.]

1802, March 16, vol. 3, p. 450, c. 269. Military peace establishment. § 11. Enlistment in the artillery, infantry, and engineers. "No person under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States, without the consent of his father, guardian, or master, first had and obtained, if any he have." [2 Stat. at Large, 132.]

1809, January 31. Vol. 4, p. 198, c. 182. "An additional naval force." § 2. Boys to be employed in the navy for two years. [2 Stat. at Large, 514.]

1809, March 3. Vol. 4, p. 223, c. 204. Augmenting the marine corps, by enlistment of 594 privates, for five years. [2 Stat. at Large, 544.]

1812, January 11. Vol. 4, p. 369, c. 337. "To raise an additional military force." § 11. The consent of parent must be in writing. [2 Stat. at Large, 671.]

1813, January 20. Vol. 4, p. 488, c. 477. § 5. Same provision. [2 Stat. at Large, 791.]

1814, December 10. Vol. 4, p. 719, c. 692, for filling the ranks of the army. § 1. Recruiting officers "authorized to enlist into the army of the United States, any free, effective, able bodied man, between the ages of eighteen and fifty years; which enlistment shall be absolute and binding on all persons under the age of twenty-one years, as well as upon persons of full age, such recruiting officer having complied with all the requisitions of the laws regulating the recruiting service." § 3 repeals so much of the 5th section of the Act of January 20, 1813, as requires the consent of the parent in writing. [3 Stat. at Large, 146.]

1815, March 3. Vol. 4, p. 825, c. 760, "fixing the military peace establishment." § 7. The several corps authorized by this act, shall be subject to the rules and articles of war, be recruited in the same manner, and with the same limitations, &c., as are authorized by the Act of 16 March, 1802. (See note, vol. 4, p. 826.) [3 Stat. at Large, 224.]

1817, March 3, pamphlet, p. 251, c. 65. Peace establishment of marine corps. Reduced to 750 privates. [3 Stat. at Large, 376.]

1820, May 15, pamphlet, p. 114, c. 132. Boys for the Navy to be enlisted. [3 Stat. at Large, 606.]

1834, June 30. Pamphlet, p. 88, c. 132. "Better organization of the marine corps." § 1. To consist of 1,000 privates. § 2. Subject to the laws and regulations for the better government of the navy, except when detached for service with the army. § 3. Shall take the oath prescribed by law; all enlistments to be for four years. [4 Stat at Large, 712.]

1837, March 2, pamphlet, p. 27, c. 21, for the enlistment of boys in the naval ser-

the enlistment of marines. It seems to have been taken for granted that they would be enlisted in the same manner as recruits for the army are enlisted; and by the Act of 1815, March 3, [3 Stat. at Large, 224,] which is the last upon the subject, they are to be enlisted in the manner and under the limitations contained in the Act of 1802, March 16th, [2 Stat. at Large, 132,] which by implication seems to admit that minors may be enlisted with the consent of their parents, guardians, or masters.

ROBERT G. VIOLETT v. SAMUEL STETTINIUS.

If the consignee, of property sent by a common carrier, demands and receives it before it reaches its ultimate destination, he is liable for the full freight.

REPLEVIN, for ninety kegs of butter. The case agreed was in substance this. On the 27th of December, 1837, one Saughenbaugh, at Pittsburgh, in Pennsylvania, received from the plaintiff's agent, ninety kegs of butter, weighing 5,738 pounds gross, which he promised in writing to deliver in good order in Georgetown, D. C., to E. Lyons, or order, within sixteen days, he paying to Saughenbaugh \$1.75 per 100 pounds carriage, for the same.

The plaintiff's said agent at Pittsburgh gave the following writing to Saughenbaugh :

Mr. Saughenbaugh will deliver ninety kegs of butter, weighing 5,733 pounds, unto E. Lyons, of Georgetown, D. C., for which you will receive \$1.75 per 100 pounds carriage.

Pittsburgh, December 26th, 1837. WILLIAM B. ENGLISH.

Saughenbaugh transported the butter to Baltimore, by wagon, and there, on the 11th of January, 1838, turned it over to the Baltimore and Ohio Railroad Company, to be transported the remaining distance to Georgetown, receiving at the same time from the company's agent \$94.94, as the *pro ra* freight, allowing \$5.47 for freight by the railroad cars to Washington, and drayage thence to Georgetown, and assigned to the company his claim and lien for freight.

On the 12th of January, 1838, the butter was transported to Washington, and there remained in the store-houses of the company, in the charge of the defendant, the company's agent, through inadvertance or some misunderstanding, until the 22d of January,

vice. § 1. That it shall be lawful to enlist boys for the navy, with the consent of their parents or guardians, not being under thirteen, nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one years. [5 Stat. at Large, 153.]

1838, when the plaintiff claimed and offered to receive it there. The defendant offered to deliver it there, or at Georgetown, on receiving the full stipulated freight, amounting to \$100.41, but the plaintiff refused to pay any thing, and replevied the butter on the 22d of January, 1838. There had been no decline in the price of butter in Washington, or Georgetown, between the 11th and 22d of January, but there had been a decline of a few cents in Alexandria, where the plaintiff resided.

If, on this statement, the plaintiff should be entitled to recover, judgment was to be entered for the costs.

If the defendant should be entitled to recover the freight, or any part thereof, judgment was to be entered accordingly for the defendant.

Mr. R. S. Coxe, for the plaintiff, contended that no freight was earned, as the goods were not carried to their place of destination; and that Saughenbaugh could not transfer his lien to the railroad company; and that the company could not recover freight, because they had delayed the butter, so that the sixteen days were passed. He cited *Jeremy on Common Carriers*, 63, 83 and 84; *Story on Bailment*, 320, 328, 359; 3 *Kent*, Com. 209; *Sheels v. Davies*, 4 *Camp*. 119.

Mr. C. Cox, contra. The carrier had a lien for his freight. The railroad company were his agents, and he did not lose his lien by the transfer of the good to his own agent. The plaintiff has his remedy against Saughenbaugh for damages by the delay, if he has suffered any. *Jeremy*, 17, 161; *Boone v. Eyre*, 1 H. Bl. 273, in the note (a); *Sheels v. Davies*, 4 *Camp*. 119; *Powell on Contracts*, 267. The plaintiff demanded the butter at Washington, and offered to receive it there.

CRANCH, C. J. I am of opinion that as the plaintiff claimed and offered to receive the butter in Washington, on the 22d of January, 1838, the defendant was entitled either to the whole freight, or freight *pro rata*. I think the whole, because he offered to deliver the butter either in Georgetown or Washington, at the option of the plaintiff, if he would pay the freight; but he refused to pay any freight at all. The delay was a proper subject of a claim for damages by the plaintiff against Saughenbaugh.

The plaintiff might have refused to receive the butter. He might have abandoned it, and brought his action against Saughenbaugh; but having claimed it, and offered to receive it at Washington, he cannot lawfully resist the claim for freight.

THRUSTON, J., concurred.

Verdict for the defendant for the freight.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1839, AT ALEXANDRIA.

Z. GARDNER'S ADMINISTRATOR v. F. PEYTON, JR.

Non assumpsit within five years, &c., is not a good plea to an action of *assumpsit* upon a promise to collect money and account for it.
The cause of action does not arise until the money has been received by the defendant and demanded by the plaintiff.

ASSUMPSIT by the defendant, as an attorney at law to collect a debt due to the plaintiff's intestate, and to account for the same when collected. The declaration avers that the defendant collected the money, but refused to pay it to the plaintiff on demand.

The COURT (THRUSTON, J., absent,) on general demurrer, decided that the plea of *non assumpsit infra quinque annos*, was not a good plea to an action upon such a promise.

At the trial, upon the issue on the plea of *actio non accrevit*, *Mr. Neale*, for the defendant, contended that the action accrued upon the receipt of the money by the defendant, and cited 3 Bl. Com. 25; Law of Virginia of November 19, 1792, p. 97, § 12; Law of Virginia, December 17, 1792, for limitation of actions, p. 107, § 4; *Taylor v. Armistead*, 3 Call, 200; *Skinner v. McClure*, 1 Rand. 284; 2 Harrison's Digest, 1458; Manning's Index, 57; 2 Tucker's Com. 388, 430; and thereupon moved the Court for an instruction to the jury to that effect.

But the COURT refused, and stopped *Mr. Taylor*, for the plaintiff, who was about to reply; being of opinion that the cause of action did not accrue until demand of payment, and the defendants refusal to pay.

Verdict for the plaintiff.

United States v. Fenwick.

UNITED STATES v. FRANCIS FENWICK.

It is error in a judge to instruct the jury that the evidence is sufficient to convict the defendant. The sufficiency is to be decided by the jury.

ERROR to the Criminal Court for Alexandria county, in a prosecution for perjury.

The judge had instructed the jury that the evidence was sufficient to convict the defendant, who objected to the instruction, and took his bill of exceptions.

The COURT (THRUSTON, J., absent,) was of opinion that the judge should not have instructed the jury that the evidence was sufficient ; that question is for the jury.

Judgment reversed, and *venire de novo* to be awarded.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1839, AT ALEXANDRIA.

JOSEPH SMITH *v.* CHESAPEAKE AND OHIO CANAL COMPANY.

A Court of Equity will not lend its aid to enforce a judgment at law obtained upon a prize ticket in a lottery drawn by mistake in a place not authorized by law.

THIS was a bill in equity, claiming an annual dividend upon an unsubscribed claim against the old Potomac company, according to the provisions of the second section of the charter of the Chesapeake and Ohio Canal Company, granted, by Virginia, on the 27th of January, 1824.

The bill after stating the origin and surrender of the charter of the old Potomac company, and the acts granting a charter to the Chesapeake and Ohio Canal Company, avers that the plaintiff is a creditor of the old Potomac company upon a judgment of this Court, obtained by the State of Maryland for the complainant's use at April term, 1820, for \$12,750, with interest from the 20th of June, 1818, till paid, and \$21.61 costs.

That, by the second section of the charter of the Chesapeake and Ohio Canal Company, the subscriptions might be paid in the claims of the creditors of the Potomac company certified by the acting president and directors to have been due for principal and interest, on the day on which the assent of the said company shall have been signified, by their corporate act, to the new charter of the Chesapeake and Ohio Canal Company as provided for in the first section of the charter of the 27th of January, 1824; provided that the amount of claims, thus to be subscribed, should not exceed \$175,800; and provided that the new stock, thus paid for, should be entitled to dividend, only as thereafter provided, (that is, after the cash-stockholders should have received ten per cent. upon the amount of cash paid upon their subscriptions. See § 11.)

That by the twelfth section it is enacted, "That it shall be the duty of the President and Directors of the Chesapeake and Ohio

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Canal Company, so long as there shall be and remain any creditor of the Potomac company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac company, on an average of the last five years preceding the organization of the said proposed company, as the demand of the said creditor or creditors, at this time, may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars."

The bill further states that the revenues of the Potomac company, for the last five years preceding the organization of the Chesapeake and Ohio Canal Company, amounted to very large sums of money, but the precise amount, the plaintiff has been unable to ascertain.

That the claim on which the judgment was rendered was assigned to the plaintiff for value received by one ———; and that before he purchased it he inquired of the president and many of the directors of the Potomac Company whether the claim was a fair and valid claim, and would be paid; to which inquiries he was answered by them in the affirmative; and that under the assurance, so given, he was induced to make the said purchase, and receive the said assignment.

That on the 6th of December, 1824, he assigned to one George Luckley, for a full and valuable consideration, four thousand dollars, part of the said judgment, with interest thereon from the 24th of December, 1823, till paid.

That on the 24th of December, 1827, the plaintiff presented a copy of the judgment to the Secretary of the Potomac Company, to be certified to the Chesapeake and Ohio Canal Company, and were informed, by the secretary, that a copy of the judgment had already been filed and entered upon the proceedings of the said company with an assignment of part thereof, as aforesaid, to the said George Luckley.

That on the 11th of August, 1828, the plaintiff made a written tender of the said judgment to the Treasurer of the Potomac Company, with a request in writing that it should be certified to the said Chesapeake and Ohio Canal Company under the provisions of their charter; and that if such certificate should be refused, his application, and the refusal of the certificate should be entered on the minutes of the Potomac Company. That the certificate was refused and that the plaintiff does not know what proceedings were had, by the board of directors of that company, on his said application.

That he has been informed and believes that Luckley was per-

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mitted to subscribe his interest in the said judgment, under the plaintiff's assignment, to the stock of the Chesapeake and Ohio Canal Company.

That the plaintiff had made frequent applications to the board of directors of that company for his dividend on that part of his said judgment which remained unassigned, and for which he has received no payment nor satisfaction according to the provisions of the twelfth section of the Act of the 27th of January, 1824, and that the board have not only refused to pay him any dividend, but deny all liability for it.

That the plaintiff has not the means of knowing the amount of the dividend to which he is entitled without access to the books and papers of the Potomac Company, now in the hands of the board of directors of the Chesapeake and Ohio Canal Company, and without an account to be taken of the average revenues of the Potomac Company for the last five years preceding the organization of the Chesapeake and Ohio Canal Company; that he has not the means of taking such an account, but they are in the power of that company, who refuse the plaintiff access thereto, &c., and he prays that that company may be made defendant, and may answer, &c.; and that an account may be taken to ascertain the dividend to which the plaintiff is entitled upon his judgment, and that the defendant may be decreed to pay the same; and for general relief.

The answer of the Chesapeake and Ohio Canal Company, admits all the acts of incorporation of the two companies, &c. Denies that, in making the estimate of the debts due by the Potomac Company, amounting to \$175,800, the plaintiff's claim was included; and affirms that the claims against that company, certified by its president and directors according to the direction of the act, amounted to \$175,325.76³/₄, in which no claim arising from the lottery was included.

It states that the lottery "out of which the claim of the complainant arises," was unlawfully drawn in the District of Columbia instead of Maryland, although erroneously and in good faith. That this Court decided, in an action brought for the price of tickets sold, that the lottery was void, and that no suit could be maintained for the price of the tickets, or for prizes. It denies that the judgment was assigned to the plaintiff "for value;" or that before he purchased it he inquired of the President and Directors of the Potomac Company, or was by them informed, that the claim was a fair or valid claim, &c.

It avers that the judgment was given under ignorance "on all sides" of the rights of the parties; that although Suckley was permitted, by the commissioners, to subscribe the amount of a

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claim, &c., the nature of the claim was not understood or investigated, &c.

This answer was not upon oath, nor under the corporate seal, but no exception was taken to it; and the cause was set for hearing upon the bill, answer, general replication, and the affidavit of S. B. Harper, and the deeds from Smith to Harper, admitted in evidence by consent, and showing that the plaintiff purchased the ticket which had drawn a prize of \$15,000 for \$13,000, paid in land, houses, and goods, of that value; which prize was the cause of action upon which the judgment was rendered against the Potomac Company in favor of the State of Maryland, for the use of this complainant, upon which the present claim is founded.

The case was then referred to a master commissioner to ascertain and report the average net annual revenue of the Potomac Company for the last five years, &c., which he found to be \$5,984.06, and the amount of the plaintiff's claim upon the judgment, including the \$4,000 assigned to Suckley, to be \$17,057.73; so that the plaintiff's annual dividend of the revenues of the Potomac Company would bear the same proportion to his claim as the whole revenues bear to the whole debts of that company, (namely, \$175,800,) if he is entitled to any thing.

Upon the coming in of the report, and on final hearing, the COURT (CRANCH, C. J., *contra*,) dismissed the bill with costs, upon the ground, as it is understood, that the drawing of the lottery in Washington, D. C., was illegal, as being contrary to the Maryland Act of November, 1792, c. 58, which was continued in force in this county by the Act of Congress of the 27th February, 1801, [2 Stat. at Large, 103,] and which declares it to be unlawful, without the permission of the legislature of the State, to propose to the public any scheme of a lottery to be drawn within the State, under the penalty of £500 current money for every offence, to be recovered by indictment.

This Court, in the case of *Hawkins v. Cox and Smith*, at June term, 1819, [2 Cranch, C. C. 173,] decided that that act of Maryland was in force in this county, considering the county as standing in the place of the State; and intimated the same opinion in the case of *Thompson v. Milligan*, at June term, 1820, [2 Cranch, C. C. 207,] which was an action brought upon a note given for tickets in the second class of the Potomac and Shanandoah lottery, granted to the Potomac Company by the Legislature of Maryland in the year 1809; upon which intimation, Mr. Key, for the plaintiff, became *non-pros*. See *Holman v. Johnson*, Cowp. 343, and 2 Comstock on Contracts, 239.

CRANCH, C. J. 1st. The first question is, whether the illegality of the drawing of the lottery in the District of Columbia, instead

of Maryland, is a defence in equity to the judgment at law, it being admitted that it was so done erroneously, but in good faith.

2d. Whether a claim against the Potomac Company, not included in the estimate of \$175,800, mentioned in the second section of the Act of the 27th of January, 1824, is entitled to a dividend under the twelfth section of that act, although the sum of \$175,800 of claims should have been subscribed as stock in the new company.

It is a rule in equity, that the Court of Equity will not aid a plaintiff in the recovery of a legal claim, contrary to conscience; that is, if the plaintiff ought not, in good conscience, to insist upon his legal right.

Whether the error, of drawing the lottery in the District of Columbia, instead of drawing it in Maryland, as stated in the answer, is sufficient to deprive the plaintiff of his equitable right to enforce his judgment, I doubt.

1. Because the answer admits that it was done by mistake, and in ignorance of the law against it, and in good faith by all the parties. There is nothing in it to affect the plaintiff's conscience.

2. Because the Potomac Company must be presumed to have sold the tickets and received the money before the lottery was drawn; and it would be against conscience in them, after receiving the fund out of which the prizes were to be paid, to refuse to pay them, upon the plea that they themselves, who had induced the ticket-holder to venture his money, had drawn the lottery in an unlawful place.

It is presumed that the case alluded to in the answer was that of *Thompson v. Milligan*, at June term, 1820, (2 Cranch, C. C. 207); but the judgment under which the plaintiff claims, was rendered at the April term preceding. It does not appear that in the case of *Thompson v. Milligan*, this Court decided any thing. Mr. Jones, for the defendant, in that case, took the ground that the note, which was for \$2,422.50, the price of sundry tickets in the lottery, was given for an illegal consideration, as being contrary to the Act of Maryland, 1792, c. 58, this Court having, at June term, 1819, in the case of *Hawkins v. Cox and Smith*, [Ibid. 173] decided that that act of Maryland was adopted by the act of Congress as the law in the county of Washington. Milligan's note having been given in that county, was supposed to have been given for an unlawful consideration, and Mr. Key, for the plaintiff, suffered a *non-pros.*, but it has not yet been judicially decided that the Potomac Company was not liable for the prizes drawn in that lottery.

3. I do not think that the claims against the Potomac Company provided for by the twelfth section of the charter of the Chesapeake and Ohio Canal Company, are limited to \$175,800.

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That is the limit of the stock of the new company, which should be paid for by claims of the creditors of the Potomac Company, certified by the president and directors of that company; but the twelfth section provides for all the creditors of that company who shall not have invested their demands against the same in stock of the new company, and does not require that those demands should be certified by the President and Directors of the Potomac Company.

If, therefore, the plaintiff had a valid claim against the Potomac Company on the 27th of January, 1824, he has a right annually to his proportion of the net amount of the revenues of that company, on an average of the last five years preceding the organization of the Chesapeake and Ohio Canal Company.

For these reasons I do not concur in the decree of the Court, dismissing the bill.

Decree affirmed by the Supreme Court, at January term, 1840.
14 Peters, 45.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1839, AT WASHINGTON.

ROBERT MAYO *v.* THOMAS J. SMITH AND F. S. MYER.

In an action upon the case for a libel, the damages were laid at twenty thousand dollars, and the plaintiff in his affidavit averred damages to the same amount; the Court required the bail to justify to the amount of five hundred dollars only.

CASE for libel. Damages laid at \$20,000. The plaintiff's affidavit to hold the defendants to special bail, stated that the defendants, on the 26th of March, 1839, "in a certain newspaper, called *The Metropolis*, in the publication of which the said Smith and Myer were then and there concerned, published of and concerning" the plaintiff, "a certain false, scandalous, and malicious libel, headed *Dr. Mayo and the Intelligencer*," which said libel is hereto "annexed," &c. "And this deponent also saith that he is informed and believes, that said Smith has no intention of remaining in the District of Columbia, but is about to depart from said district for the southern States. He further saith, that by the publication of said libel he hath incurred and sustained damages to the value of \$20,000."

Mr. Hoban and *Mr. Key* moved for leave to appear for the defendant without special bail; or that the bail demanded should be mitigated; and cited *Jones v. Kelly*, 17 Mass. Rep. 115, and 2 Wheeler, 54.

Mr. R. S. Coxe and *Messrs. Brent & Brent* contended that the affidavit of the plaintiff was conclusive; that the libel is atrocious. The affidavit is positive that the defendants published it in the newspaper in which they were concerned, and that the plaintiff has thereby suffered damages to the value of \$20,000. The plaintiff's counsel cited the case of *Barrell v. Simonton*, in this Court, at May term, 1826, (2 Cranch, C. C. 657,) where bail was refused in an action for a malicious arrest, only on the ground that the action in which the plaintiff was arrested, was not then terminated; and the case of *McDonald v. Little*, in this Court, at the last term, (not reported,) and the case of *Doyme v. Barker*, at

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November term, 1834, (4 Cranch, C. C. 475,) in which bail was required, in slander, in \$700, upon an affidavit of the plaintiff's belief that she had suffered damage to the value of \$3,000.

The COURT (THRUSTON, J., absent,) in the present case, said they would be satisfied with bail who could justify in \$500.

GEORGE M. DAVIS v. HUGH A. GARLAND.

The clerk of the House of Representatives is not personally responsible in damages for refusing to give the public printing to a person to whom the preceding clerk had promised it, and, therefore, cannot be held to special bail in an action upon the case founded on such refusal.

THIS was a special action upon the case, in which the plaintiff, in his declaration, complained, that whereas the House of Representatives of the United States, at the 1st session of the 25th Congress had passed a resolution that their clerk be directed to cause to be printed, a ninth volume of the laws of the United States, after the manner of the 8th volume thereof, in pursuance of which resolution, the then clerk, one Walter S. Franklin, in the year 1838, had, in his capacity of clerk of the said house, employed the plaintiff, and agreed and contracted with him to print a ninth volume of the said laws, in the manner as resolved, and to deliver a copy of the said laws to the plaintiff, to enable him to print the same; the plaintiff in consideration thereof had made ample arrangements, and employed the means to print the said ninth volume, and was ready and willing to print the same, when the said Walter S. Franklin departed this life, and the defendant was elected his successor as clerk of the House of Representatives; soon after which the defendant was notified of the said contract, and of the plaintiff's readiness and preparation to comply with the same; and the plaintiff demanded of the defendant a copy of the said laws, for the purpose of printing the same, according to the said resolution and contract; but the defendant intending to injure the plaintiff, and to deprive him of the benefit of the said contract, refused to deliver to the plaintiff a copy of the said laws, and prevented plaintiff from printing the same; by means whereof he lost the printing of the said ninth volume of the said laws, and the benefit of the said contract, and has lost his time, trouble, and money in preparations for complying with the said contract, &c. to the value of \$2,500.

The second count contains an additional averment, that the defendant after having had notice of the contract with the plaintiff, and his readiness to comply with it, gave the job to another person.

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The facts were substantially verified in the plaintiff's affidavit, and the further fact that the persons whom the plaintiff had employed to do the work, had purchased paper to the amount of \$300; and that he had sustained damage, by the defendant's refusal, &c. to the sum of \$2,500.

Mr. Key moved for leave to enter an appearance for the defendant without special bail; upon the ground that it appeared, on the face of the declaration, and by the plaintiff's affidavit, to be a public contract, upon which the defendant was not personally liable.

Mr. Morfitt, for the plaintiff, contended that this action was not founded on the contract, but on the tort in the defendant's not delivering to the plaintiff a copy of the laws, which it was his duty, as a public officer, to deliver, to enable the plaintiff to comply with the contract which he had made with his predecessor.

But the COURT, (THRUSTON, J. absent,) refused to require special bail; considering it as a public contract made under a resolution of the House of Representatives, and for which neither the present defendant, nor his predecessor, was personally liable.



ABRAHAM B. WALLER v. DYER AND BLAGDEN, Trustees of Nathan Smith.

No debt for materials furnished for building a house in Washington, Alexandria, or Georgetown, D. C., will under the Act of Congress of 2d March, 1833, remain a lien upon the house for more than two years from the commencement of the building, unless an action for the recovery of the debt be instituted, or the claim filed within three months after furnishing the materials, &c.

BILL IN EQUITY to compel the execution of a trust.

The question submitted to the court, upon a case stated was, whether the complainant, who furnished materials for a dwelling house, built by Nathan Smith, who had conveyed it in trust to Dyer and Blagden, to secure certain debts of Smith, had, on the 29th of October, 1835, any lien upon the building for which the materials were furnished?

The case agreed was, that Smith began to build the house before the 25th of October, 1833. That the materials were furnished by the complainant, Waller, before the 1st of August, 1834, and were used in building the house. That on that day, Waller came to a settlement of the account of materials furnished, and Smith gave his note to Waller at 90 days, for the amount, (\$651.54.) That on the 11th of November, 1834, Waller brought suit upon the note, and at March term, 1836, recovered judg-

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ment, but did not file his claim in the clerk's office, nor institute his action for the debt within three months after furnishing the materials.

On the 20th of October, 1835, the creditors of Smith, excepting the complainant, and Shepherd and Mudd, who supposed they then had a lien upon the building for the materials which they had furnished, entered into a written agreement with Smith to give him time until the 1st of November, 1837, upon his giving security by a deed of trust upon all his real estate in the city of Washington.

On the 29th of October, 1835, the complainant and Shepherd and Mudd executed the following writing: "Whereas the creditors of Nathan Smith have generally united in an agreement to extend the time of their demands, upon his executing a certain deed of trust, particularly mentioned in the said agreement; and whereas we, the undersigned creditors, have liens upon part of the property of the said Nathan Smith, and are, therefore, not upon the same footing with the other creditors, but are desirous to make the same extension of credit that they have; now we do agree to forbear any coercion of our several demands upon him for the term of two years from the first day of November next, provided that the said Nathan Smith shall and do first execute his deed of trust according to the terms of the agreement hereinbefore referred to; and provided also, that his other creditors shall agree to the like extension, so that we shall not lose any priority of lien, whether under the lien law, or otherwise, which we now may have."

On the 31st of October, 1835, Smith executed the deed of trust to the defendants Dyer and Blagden, reciting the names of his creditors, and the amount due to each, and among the rest, "to Abraham B. Waller, in the sum of \$651.54. And whereas also the said Shepherd and Mudd and Abraham B. Waller have executed and delivered to the said Nathan Smith, an instrument of writing, dated on the 29th day of October, 1835, making the same extension of credit given in the first-named instrument of writing, dated on the 20th day of October, 1835, and on the same conditions, but reserving any priority of lien, whether under the act of Congress aforesaid, or otherwise, which they, the said Shepherd and Mudd and Abraham B. Waller, might have on the said 29th day of October, 1835, and whereas also," &c. "Provided, however, that nothing herein contained shall be construed to impair the legal priorities of lien hereinbefore mentioned as belonging to the Patriotic Bank, and to Shepherd and Mudd, or which belongs to Abraham B. Waller."

The Act of Congress of the 2d of March, 1833, [4 Stat. at

Large, 659,] entitled "An Act to secure to mechanics and others, payment for labor done, and materials furnished in the erection of buildings in the District of Columbia," after giving a lien, &c., provides, "That no such debt for work and materials, shall remain a lien on the said house or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within three months after performing the work, or furnishing the materials, in the office of the clerk of the court for the county in which the building shall be situated."

It was agreed by the counsel for the parties respectively, that if the Court should be of opinion that the complainant had such a lien on the 29th of October, 1835, then a decree should be rendered against the trustees for the amount of the note. If otherwise, then the decree should be for an equal dividend with the other creditors.

On the 26th of November, 1839, the case was argued by *Mr. Bradley*, for the plaintiff, and by *Mr. R. J. Brent* and *Mr. Hellen*, for the defendants.

The COURT was of opinion that the complainant had no lien on the 29th of October, 1835, as the two years expired on the 25th.

SAMUEL STETTINIUS v. THE UNITED STATES.

An indictment upon the first section of the Act of Congress of the 7th of July, 1838, c. 212, "to restrain the circulation of small notes, as a currency, in the District of Columbia, and for other purposes," should aver that the note passed, or offered to be passed, was "paper currency."

And an indictment upon the second section of the act, should aver that the note issued was "paper medium, evidently intended for common circulation."

The passing of a note of less denomination than five dollars is not an offence against the statute unless it be "paper currency," or "paper medium, evidently intended for common circulation."

The offence under the statute, does not consist in circulating paper as currency, but in passing paper currency; that which is already currency, or evidently intended for common circulation.

It is no justification for passing such paper as the act prohibits, that it was passed in payment of a *bonâ fide* debt; nor that it was passed with intent that it should be carried out of the district; nor that the defendant was agent of the railroad company.

The term "bank-bill," as used in the act, does not, of itself, purport to be paper currency, without a special averment to that effect.

The jurors are not judges of the law, even in a criminal case. They have the power to give a general verdict upon the general issue, which includes the question of law, as well as of fact; but when, by pleading, or by special verdict, or demurrer to evidence, the law is separated from the fact, they have no right to decide the law. It must be decided by the judge.

The right and power of the jury, whatever they may be, are exactly alike in civil and in criminal cases.

Stettinius v. United States.

The argument of counsel on the law should be addressed to the judge ; and whenever the question of law is judicially presented to him unmixed with the fact, either by demurrer to the evidence, a special verdict, or by motion for an instruction to the jury upon a hypothetical state of facts, it is not only the right, but the duty of the judge, to decide the question. The right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instructions as may be asked. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law upon the whole evidence, leaving the question of fact entirely with the jury.

The process of attainr is obsolete in England, and never was in practice in this country.

In practice, both in this country and in England, the counsel for the defendants in criminal cases, have been allowed to argue the law to the jury upon the general issue.

The jury have the power to take upon themselves the responsibility of judging for themselves of the meaning of the law ; and they may, if they will, but not of right, find a verdict against law ; and such a verdict, if in favor of the defendant, will be as conclusive and effectual as if it were according to law.

According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the argument of the defendant's counsel, instructed the jury upon the law in the same case ; but there are few, if any, courts of criminal jurisdiction, who will suffer counsel to appeal from the court to the jury, upon a question of law which the court has decided against the defendant after he has orally joined issued upon the question and argued it before the court.

If the defendant's counsel does not join in the argument to the court, but insists upon arguing it to the jury, the Court will require him to proceed with his argument to the jury, and will, after argument, give or refuse such instruction as the Court shall think proper.

It is the duty of the jury to follow the law as laid down by the Court.

ERROR to the Criminal Court of the District of Columbia,¹ upon two indictments, both exactly in the same form.

The first (No. 106) charges that the defendant, on the 15th of October, 1839, at Washington county, with force and arms, "did pass, and offer to pass, to George McCawley, within the District of Columbia, to wit, at the city of Washington, in the county of Washington, in the district aforesaid, a certain note, and bank-bill for the payment of one dollar, being of a less denomination than five dollars, against the form of the statute in such case made and provided, and against the peace and government of the United States."

In the other indictment (No. 107) the name of Electus Semmes was substituted for that of George McCawley.

Upon this indictment (No. 107) the jury returned the following verdict :

"We, the jurors in the case of *The United States v. Samuel Stettinius*, are of opinion that he is guilty of passing to the witness in the case, notes of a less denomination than five dollars, in the manner and at the time and place stated in the evidence ; but,

¹ Hon. James Dunlop, sole judge.

from the said evidence, not guilty of circulating them in the District of Columbia. November 22, 1839."

The parties agreed to receive this "as a special verdict, as if formally made out as such, and to be taken in connection with, and considered as referring to, the evidence as stated."

Upon the indictment No. 106, there was a general verdict, "guilty."

The evidence stated, as given by the United States in support of the indictment No. 106, for passing the note to George McCawley, was, that the United States offered "a competent witness," "who proved that the day after the present suspension by the banks of this district, of specie payments, which was on the 11th of October, 1839, "he was going to Baltimore in the railroad cars, and gave the traverser, at the railroad office in Washington city, in order to pay for his passage, a five-dollar note, who gave him in change, just as the cars were about to start, two notes of one dollar each, of Cohen's Bank in Maryland; that the said traverser was then acting as agent of the Baltimore and Ohio Railroad Company, which is admitted to be a company incorporated by an act of Congress; that the traverser knew that he (the witness) was going to Baltimore in the cars, at the time; that he took the notes with him to Baltimore, and brought them back again to Washington, where he resides."

In support of the indictment No. 107, for passing a one-dollar note and bank-bill to Electus Simms, a bill of exceptions states, that "a competent witness was sworn on the part of the United States, who proved, that on the 15th of the last month, (October, 1839,) he was going to Baltimore in the railroad cars, and offered to the traverser in the city of Washington a five-dollar bank note to pay his passage in the cars; the traverser was acting as agent of the Baltimore and Ohio Railroad Company in said city. The traverser took the note, and gave, in change, to the witness, an half dollar in silver, and two one dollar notes. He asked the traverser if he was passing dollar notes, to which he replied, 'why, Mr. Semmes, what can I do?' The witness went to Baltimore in the cars, and when there passed the notes away, without difficulty, at par. He did not remember of what institution the notes were, but thought it likely they were Maryland notes. It was admitted that the railroad company was chartered by Congress."

At the trial, several bills of exceptions founded upon the evidence, as stated in the testimony of the two witnesses, were taken to the instructions given or refused by the judge.

Upon the trial of the general issue in the Criminal Court, District of Columbia, upon the indictment No. 106, four bills of exceptions were taken by the defendant.

1. The first was to the following instruction to the jury, given by the judge at the motion of the district attorney, namely :

“That if they believe the evidence as above stated,” (in support of this indictment No. 106,) “to be true, then the passing of the note as above stated, if believed to be true, was a violation of the Act of Congress, entitled, ‘An Act to restrain the circulation of small notes as a currency in the District of Columbia; and for other purposes,’ approved, July 7, 1838; and that the said act of Congress is a valid and constitutional law in force in this district.”

2. The second bill of exceptions, in the case No. 106, is to the refusal of the judge, at the motion of the defendant’s counsel, to instruct the jury, that “if they believe from the evidence that the note in question, if passed at all as stated by the witness, was passed by the traverser in payment of a *bonâ fide* debt due by him to the witness, then the act does not come within the prohibition of the law of Congress, and the traverser is entitled to a verdict of acquittal.”

3. The third bill of exceptions, upon the trial of this issue, is to the refusal to instruct the jury at the motion of the defendant’s counsel, “that, should they be of opinion from the evidence, that the defendant did pass the note named in the indictment, but with the intent that the same should be carried into the State of Maryland, and not to be circulated within the District of Columbia, then the defendant is entitled to an acquittal.”

4. The fourth bill of exceptions, upon this issue, was as follows: “Upon the trial of this cause, and after the argument of counsel had closed, and before the jury had retired, the Court, in a charge given to the jury, after stating that the jury might decide upon the law and the evidence, and, in rendering a general verdict, had a constitutional right so to do, stated that the jury would take upon itself a very great responsibility, which they ought not to do, in deciding upon the law of the case, in opposition to the opinion of the Court; and that they ought not to take upon themselves to render a verdict calculated to revoke the legislation of Congress, composed of many constitutional lawyers; and that it increased the responsibility of the jury so to decide, in this case, in favor of the defendant, upon the law, because the United States could not appeal; whereas if they found the defendant guilty, he might; and might have the law interpreted, and reverse the judgment, if erroneous; and further said, that if the fact was proved, of passing the note once, the case was brought within the act of Congress.

“To this charge of the Court, the defendant by his counsel excepts, because the Court ought not to have given said charge, which was calculated to intimidate the jury, and to destroy their free and independent exercise of opinion in the case; and because

the said change was calculated to induce the jury to render a verdict against the defendant for reasons which ought not to operate on their minds; and that the court erred in stating that if the facts were proved to the satisfaction of the jury, the case was brought within the Act of Congress; and it is prayed that this bill of exceptions may be signed and sealed, this 21st November, 1839."

Upon the trial of the issue upon the indictment No. 107, the defendant's counsel took three bills of exceptions.

1. The first states that the United States District Attorney prayed the court to instruct the jury, that if they believed the evidence aforesaid, (namely, the evidence contained in the testimony of the witness, as before stated, who was examined in support of this indictment No. 107,) "then the passage of the note charged in the indictment was a violation of the Act of Congress, entitled," &c. "and that the jury are bound by the said act, (if they believe the facts proved by the witness,) to find the traverser guilty:—

"And thereupon the counsel for the traverser objected to the court's giving the said instruction, or giving any instruction as to the law, to the jury; and declined arguing the law to the court, on the ground that they had a right to argue to the jury, both on the law and the evidence. And the court decided, on this objection being made, that the traverser's counsel would be allowed to argue the law to the jury, and that after such argument the court would instruct the jury as to the law; and thereupon the law was argued to the jury by the counsel for the traverser, and by the United States Attorney; and the court, after the said argument, was asked by the United States Attorney to give the instruction before prayed; which instruction the court gave. To this instruction, so given, the traverser by his counsel excepts," &c.

2. The second bill of exceptions taken upon the trial of this issue, is to the refusal of the court to instruct the jury, that "if they should be of opinion that the defendant did not pass the note for and in lieu of gold and silver, and that he did not intend to put the same into circulation in the District of Columbia, then the defendant is entitled to an acquittal."

3. The third bill of exceptions, upon the trial of this issue, is to the refusal of the court to instruct the jury, upon the evidence aforesaid, that if they "believe that the note passed by the defendant, was passed to a person who, as the defendant knew, was going immediately to Maryland, as a passenger in the railroad cars, without any opportunity of circulating said note in the District of Columbia, before leaving said district, and that said note was issued and redeemable in Maryland, and that said person did immediately after receiving the said note, leave the said district,

without circulating it here, and did pass it off in the State of Maryland, then the jury may infer that the note was not passed by the defendant as paper currency, to circulate in said district, and that the case is not within the spirit and intention of the Act of Congress."

The Act of Congress of the 7th of July, 1838, [5 Stat. at Large, 297,] entitled "An Act to restrain the circulation of small notes as currency in the District of Columbia, and for other purposes," upon which this prosecution is supposed to be founded, provides in the first section, "That after the 10th day of April" (then) "next, it shall not be lawful for any individual, company, or corporation to issue, pass, or offer to pass, within the District of Columbia, any note, check, draft, bank-bill, or any other paper currency, of a less denomination than five dollars; and if any person or corporation shall violate the provisions of this section, the person so offending, or, in case of a corporation so offending, the officers of any such corporation for the time being, shall be liable to indictment by the grand jury of the county, within the district where the offence shall have been committed, and the person so offending, or the officers of the corporation so offending, shall, on conviction thereof, be fined in a sum not exceeding \$50, at the discretion of the court, for every offence; one half of the said fine shall be paid to the prosecutor; the other half shall be for the use of the county where the offence shall have been committed." "And the person so offending, and the officers of any corporation, shall also be liable to pay the amount of any note, bill, check, draft, or other paper, constituting part of such currency, to any holder thereof, with all costs incident to the protest and legal collection thereof, with fifty per cent. damages for non-payment on demand, to be recovered by action of debt; and in case of judgment for the plaintiff, execution thereon shall be had forthwith; and it shall be the duty of the District Attorney of the District of Columbia, to commence prosecutions against all persons, and every corporation offending against this section, of which he shall have knowledge or probable information. And in case of corporations, the prosecution shall be against the president, or any director or cashier thereof for the time being; and it shall be the duty of the grand jurors to present all such offences of which they have knowledge or probable information; and that no member of a grand jury shall be ignorant of his duty in this particular, it shall be the duty of the court having cognizance of all offences against this section, to give the same in charge to the grand juries at the commencement of the term next after the passage of this act.

And in the second section it is "further enacted, that from and

after the passage of this act, it shall be unlawful for any individual, company, or corporation, to issue *de novo*, or knowingly to pass, or procure to be issued, passed, or circulated within the district aforesaid, any note, check, bank-bill, or other paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or for any other pretence whatever, and which shall be issued and circulated for the first time after the period above limited in this section, under the penalties provided in the foregoing section."

The cause was argued by *Mr. C. Cox* and *Mr. R. J. Brent*, for the plaintiff in error, and by *Mr. Key*, for the United States.

CRANCH, C. J., delivered the opinion of the Court; (THRUSTON, J., dissenting.)

The judgment below was against the defendant upon both indictments, although it is understood that a motion had been made in arrest of judgment. The record had not been made up at full length, and there is no formal assignment of errors; but in argument the counsel for the traverser contend,

1. That there is error in overruling the motion in arrest of judgment, because the indictment does not substantially set forth any offence against the statute.

The gist of the offence intended to be forbidden by the statute, and punished, is the issuing of paper currency of a less denomination than five dollars. Unless, therefore, the notes passed by the defendant were such notes as were "paper currency," and which, in the second section, is called "paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or any other pretence whatever," he has committed no offence against the statute.

Its title (which may be resorted to, to ascertain the evil which was in the contemplation of the legislature, although it will not restrict the enacting clauses, if they clearly go beyond it,) is, "to restrain the circulation of small notes as a currency;" and the enacting clauses forbid the issuing or passing of "any note, check, draft, bank-bill, or any other paper currency of a less denomination than five dollars;" and "any note, check, bank-bill, or other paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change in gold or silver, or for any other pretence whatever."

It is clear that negotiable notes, checks, and drafts for a less sum than five dollars, may be issued or passed from debtor to creditor in *bonâ fide* payment of a debt, or for the purchase of

goods, in the common course of mercantile transactions, without incurring the penalty of the statute.

The passing of a note, check, or draft is *primâ facie* a lawful act; and every man is presumed innocent until the contrary appears.

All the facts charged in the indictment may be true, and yet the traverser not guilty.

If the indictment had simply charged the passing of a note, check, or draft for the payment of one dollar, it would not have charged any offence, unless the note had been averred to be, "paper currency," or "paper medium," &c.

But it charges the traverser with passing a note and bank-bill.

If the jury had found the traverser guilty of passing the note only, he must have been acquitted, because the passing of the note was no offence unless it was "paper currency," or "paper medium evidently intended for common circulation."

Is the word bank-bill better than note? Does the name, *per se*, import paper currency without an averment that it was paper currency? It might have been a bank-bill, and yet be what the brokers call an uncurrent bank-bill, or a bank-bill not payable to order, or bearer. It might have been the bill of a bank long since broken, and whose notes are no longer current. If the names, "note," "draft," and "check," are insufficient, *per se*, we do not perceive why the name "bank-bill" should not be insufficient also.

In the cases of *Ringgold* and of *Milburn*, this Court decided, that under the statute which prohibited the keeping of "a faro-bank or other common gaming-table," an indictment for keeping a faro-bank was not sufficient without also averring it to be a common gaming-table, or a common faro-bank. Although I did not concur in those decisions, yet they are binding upon this Court, in like cases. I dissented, in those cases, because I thought that the term "faro-bank" did, *per se*, import a common gaming-table; and that it would be tautology to say a common faro-bank. In the present case I do not think that the names, "note," "check," and draft," or even bank-bill, do of themselves import a paper currency, so as to dispense with an averment, in the indictment under the first section of the act, that they were paper currency; without such an averment and without setting forth the note or bill, so that the Court may judge whether it was such a note or bill as is meant to be prohibited by the statute, we think the indictment does not charge an offence against that section; and that the judge erred in not arresting the judgment. See the *State of Maryland v. Scribner*, 2 Gill & Johnson, 251, and *The Mary Anne*, 8 Wheaton, 386, 389.

Another reason suggested in arrest of judgment is, that the act of Congress is unconstitutional, because Congress cannot regulate the currency unless by some uniform rule operating equally upon all the States and territories.

The answer, to this is, that Congress, in legislating for this district, has the same power which a State has in legislating for the State, superadded to the power of legislating over all the States and territories as to the matters within its constitutional jurisdiction.

2. The second error, suggested in argument, is, that the special verdict (in the case No. 107,) did not justify the judgment against the traverser; but is, in effect a verdict of acquittal, inasmuch as it finds him not guilty of circulating the notes in the District of Columbia.

This special verdict, if extended according to the agreement of the counsel, would state,

That Electus Semmes, the person named in the indictment, on the 15th of October, 1839, was about to go to Baltimore in the State of Maryland, in the railroad cars of the Baltimore and Ohio Railroad Company; the same company then and there being a company chartered by Congress, and in the city of Washington, in the county of Washington, in the District of Columbia, offered to the traverser, who was then and there acting as the agent of the said company, a five-dollar bank-note to pay for his passage in the said cars in the city of Washington. That the traverser took the said note and gave in change to the said Electus Semmes, a half dollar in silver and two one-dollar notes, the same being notes issued and payable in the State of Maryland. That the said Electus Semmes went to Baltimore aforesaid, on the said day, in the said cars, and when in Baltimore passed away the said two notes without difficulty at par, and did not circulate them in the District of Columbia as a currency.

Being of opinion that the passing of a note of a less denomination than five dollars is not an offence against the statute, unless it be "paper currency," or "paper medium of the denomination aforesaid, evidently intended for common circulation, as for and in lieu of small change," or for some other pretence, we think the special verdict, if not a verdict for the traverser, is an imperfect verdict, in not finding that the notes passed by the traverser were "paper currency," or "paper medium evidently intended for common circulation," &c., and that it does not support the judgment against the traverser. It does not say any thing of the bank-bill charged in the indictment.

But, as the evil to be remedied was "the circulation of small notes as a currency, in the District of Columbia," and as the jury

have expressly found that the traverser did not circulate the notes in the District of Columbia, as a currency ; and inasmuch as circulating is passing away in change or otherwise, it would seem, at first view, that the verdict amounts to an acquittal, as it denies the commission of the act which the legislature intended to guard against.

But they have not made the offence to consist in circulating paper as currency, but in passing paper currency. It must be paper currency before, or at the time of passing it ; that is, as explained by the second section of the act, " paper constituting part of such currency ;" or as further explained in the same second section, " paper medium of the denomination aforesaid, evidently intended for common circulation," &c. A denial that the traverser passed the paper as currency, is not a denial that he passed paper currency ; so that we think the verdict is not a verdict of acquittal.

3. The next error suggested is that the judge erred in instructing the jury, (at the prayer of the United States Attorney, in the trial of the issue upon the indictment No. 106, as stated in the traverser's first bill of exceptions upon the trial of that issue,) " That if they believed the evidence, as above stated in support of that indictment to be true, the passing of the note as therein stated, was a violation of the act approved 7th July, 1838, entitled, "An Act to restrain," &c.

According to the interpretation of the act which we have before given, it is evident that the offence was not committed, unless the note was paper currency, or paper medium evidently intended for common circulation, &c. ; a fact not stated in the evidence, and not found by the jury.

We are, therefore, of opinion, that the judge erred in giving that instruction.

4. The next error suggested, consists in the refusal of the judge to instruct the jury (as prayed by the traverser in his second bill of exceptions upon the trial of the issue upon the indictment, No. 106, as follows :) " That if they believe, from the evidence, that the traverser passed the note in payment of a *bonâ fide* debt due by him to the witness, the act does not come within the prohibition of the law of Congress."

This instruction seems to have been very properly refused, and the exception does not appear to be insisted upon in argument.

5. The fifth error suggested is, the refusal of the judge to instruct the jury, at the prayer of the traverser, (as stated in his third bill of exceptions upon this issue,)

" That should they be of opinion from the evidence, that the traverser passed the note with intent that the same should be car-

ried into the State of Maryland, and not be circulated within the District of Columbia, then the traverser is entitled to an acquittal."

This instruction, also, we think was correctly refused, as the act does not make the intent to circulate an ingredient in the offence. The offence is the passing of "paper currency of a less denomination than five dollars," and the penalty for doing this, was the means by which the legislature intended to restrain the circulation of small notes as a currency within the District of Columbia.

6. It was also suggested in argument, that the judgment ought not to have been rendered against the traverser on the special verdict, because it finds that the traverser, in passing the notes, was then acting as agent of the Baltimore and Ohio Railroad Company; the same then being a company incorporated by an act of Congress; that it was, therefore, an act of the company; and that, according to the provisions of the statute, the indictment should have been against the president, or a director, or the cashier of the company, and not against the traverser.

But the jury have not found that the passing of the notes was the act of the company; nor that they were passed by the order or consent of the company, without which the company cannot be charged criminally. The jury have found a fact, from which they might have inferred and found that the notes were passed by the company, but not having found that fact expressly, the Court cannot infer it and make it the foundation of a judgment of acquittal in favor of the traverser. He might well have been acting as the agent of the company, and yet have no authority from them to pass the notes; and such authority to do an illegal act (if it were such,) cannot be presumed.

We think, therefore, that the judge did not err in refusing to arrest the judgment on that ground.

7. The seventh error suggested, is stated in the traverser's first bill of exceptions upon the trial of the issue upon the indictment No. 107, and consists in the judge's overruling the objection of the traverser's counsel, to the judge's giving any instruction to the jury as to the law; the traverser's counsel having declined arguing the law to the Court, on the ground that they had a right to argue to the jury both on the law and the evidence; to the overruling of which objection, and to the instruction which the judge, at the prayer of the United States Attorney, gave to the jury, which was similar to that given at his prayer upon the trial of the issue on the indictment No. 106, the traverser's counsel excepted.

As to the question whether the instruction thus given to the

jury, in point of law, was correct, we have already said, in considering the instruction given upon the trial of the issue on the other indictment, that the offence was not committed, unless the note was paper currency, or paper medium evidently intended for common circulation; a fact not found by the jury, nor stated in the prayer for the instruction; and therefore we are of opinion that the judge erred in giving that instruction.

The objection to the judge's giving any instruction to the jury as to the law, when the defendant's counsel declines arguing the law to the Court, and insists upon arguing it to the jury, seems to be founded upon the idea that the jurors are the sole judges of the law, and are under no obligation to respect the decisions of the judge upon the questions of law arising in a criminal cause.

The right of the jury to find a general verdict upon the general issue in a criminal cause, is not disputed nor doubted; and as guilt consists of law and fact, and cannot be ascertained but by coupling them together, and comparing them, and applying the facts to the law, they must, in finding such a general verdict, decide the law thus coupled with the facts in that cause.

But when the jurors thus took upon themselves to decide the law by a general verdict of not guilty, they subjected themselves, under the old English statutes, to very severe punishment, upon a writ of attain, if the grand inquest should convict them of finding a false verdict. To avoid this risk, it was formerly common for the jurors to render special verdicts, stating all the facts of the case, and referring the question of law to the Court; but the practice of setting aside verdicts, upon motion, and granting new trials, has so superseded the use of attain, that there are few instances of an attain in the books later than the sixteenth century. 3 Bl. Com. 406. Yet as late as Sir Matthew Hale's time, according to his opinion, the king might have attain upon a verdict of acquittal, although the prisoner, if convicted, could not; because his guilt is confirmed by two inquests; the grand and the petit jury.

The right and the power of the jury to decide the law and the fact together, by a general verdict upon the general issue, is not greater in criminal causes than in civil. The effect only is different. In civil causes, the Court will set aside the verdict, if against its opinion of the law, whether the verdict is against the defendant or the plaintiff; but in criminal causes, if the verdict be in favor of the defendant, inasmuch as the king might have a writ of attain and reverse the judgment; and as the prisoner is not to be put twice in jeopardy, nor to be twice vexed for the same offence, and as he could not have attain if the verdict should be against him, the courts have uniformly, for more than two centu-

ries, refused to award a new trial when the prisoner has been acquitted upon a general verdict of not guilty. This conclusive effect of a verdict of acquittal does not arise from the right of the jury to decide the law definitively in the case, because if the verdict of the jury had been against the defendant, contrary to law, or to the court's exposition of the law, the court unquestionably had the right and the power to set aside the verdict as being contrary to law, and to award a new trial. This could not be the case if the jury had the exclusive right to decide the law. If they had, the verdict would be as conclusive in the one case, as in the other.

It is admitted by all who have advocated the right of the jury to decide the law in criminal cases, that that right extends only to the finding of a general verdict upon the general issue. When the issue is on some collateral point, it involves no question of law, but is confined exclusively to facts. When the verdict was upon such a collateral issue, there was no attainder. That process lay only in cases where the jury undertook to decide the law by a general verdict on the general issue.

Whenever, by the pleadings, the law was separated from the fact, so that each could be seen and considered by itself, no pretence that the jury had a right to decide the pure unmixed question of law, has ever been set up by the wildest advocate of the rights of juries.

In the trial of the impeachment of Judge Chase, Mr. Randolph, one of the managers of the prosecution, in speaking of this right of juries to decide the law, calls it "their undeniable right of deciding upon the law as well as the fact necessarily involved in a general verdict." He said, also, "there is, in my mind, a material difference between a naked definition of law, the application of which is left to the jury, and the application, by the court, of such definition to the particular case upon which the jury are called upon to find a general verdict. Surely, there is a wide and evident distinction between an abstract opinion upon a point of law, and an opinion applied to the facts admitted by the party accused, or proven against him."

Speaking of the prior decisions of the same points of law in some former cases by other judges, Mr. Randolph said, "they exercised the acknowledged privilege of the bench in giving an opinion to the jury on the question of law after it had been fully argued by counsel on both sides." Again, he said, "I do not deny the right of the court to explain their sense of the law to the jury, after counsel have been heard, but I do deny that the jury are bound by such exposition."

Mr. Early, another of the managers of that impeachment, said,

"It is no part of my intention to deny the right of judges to expound the law in charging juries ; but it may be safely affirmed, that such right is the most delicate they possess, and the exercise of which is to be guarded by the utmost caution and humanity."

Mr. Edward Tilghman, who was examined as a witness in the trial of that impeachment, testified, that in Pennsylvania, the judges, "in their charge to the jury, state the law and the evidence, and apply the law to the evidence. The court generally hear the counsel at large on the law ; and they are permitted to address the jury on the law and the fact ; after which the counsel for the State concludes. The court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury."

In *Croswell's case*, 3 Johns. Ca. 346, the counsel for the defendant admitted it "to be the duty of the court to direct the jury as to the law ; and it is advisable for the jury, in most cases, to receive the law from the court, and in all cases they ought to pay respectful attention to the opinion of the court ; but it is also their duty to exercise their judgments upon the law as well as the fact ; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions." The same counsel said further, that "in civil cases, the power of the court to decide the law, is absolute and conclusive, and may be rightfully so exerted. That in criminal cases, the law and the fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact."

Judge Chase, in his answer to one of the articles of impeachment, says, "He well knows that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law ; and that hence results the power of juries to decide on the law as well as on the facts in criminal cases." "But he also knows, that in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power ; and their right to expect and receive from the court all the assistance which it can give for rightly understanding the law. To withhold this assistance in any manner whatever ; to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake ; would be an abandonment, or a forgetfulness of duty, which no judge could justify to his conscience, or the laws."

And in the opinion which the Court had prepared in the case

of John Fries, they said: "It is the duty of the court, in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide in this, and in all criminal cases, both the law and the facts, on their consideration of the whole case."

Mr. Hargrave, in his Note 7 to Co. Lit. 155 b, has given a very able opinion upon this question of the right of the jury to decide the law in criminal cases.

Lord Coke, in folio 155 b, had said: "The most usual trial of matters of fact is by twelve such men; for *ad quæstionem facti non respondent iudices*; and matters in law the judges ought to decide and discuss; for *ad quæstionem juris non respondent iuratores*."

In his note to this passage, Mr. Hargrave says: "This *decantatum* (as Lord Chief Justice Vaughan calls it, on account of its frequency in the books,) about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy, especially in prosecutions for state libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence."

After stating several of the old cases, he says: "In respect to my own ideas on this subject, they are at present to this effect:—" "On the one hand, as the jury may, as often as they think fit, find a general verdict, I, therefore, think it unquestionable, that they may so far decide upon the law as well as the fact; such a verdict necessarily involving both. In this, I have the authority of Littleton himself, who hereafter writes, that if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally; (*ante*, § 368 and *post*, folio 228)."

"But, on the other hand, I think it seems clear that questions of law generally, and, more properly, belong to the judges; and that, exclusively of the fitness of having the law explained by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.

"1. If the parties litigating agree in their facts, the cause can never go to a jury; but is tried on a demurrer, it being a rule, and I believe without exception, that issues in law are determined by the judges, and only issues of fact are tried by a jury, *ante*, 71 b.

"2. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to the evidence, which includes an admission of the fact to which the evidence applies, may, so far, draw the cause from the cognizance of the jury, for, in that case the law is reserved for the decision of the Court from

which the issue of fact comes; and the jury is either discharged, or, at the utmost, only ascertains the damages; *ante*, 72 a. Doug. 127, 213; Bul. N. P. 2d ed. 313.

"3. The jury is supposed to be so inadequate in finding out the law, that it is incumbent upon the judge who presides at the trial to inform them what the law is; and as a check to the judge, in the discharge of his duty, either party may, under the statute of Westminster, 2, c. 31, make his exception in writing to the judge's direction, and enforce its being made part of the record, so as afterwards to found error upon it. See *post*, 2 Inst. 426; Trials *per pais*, 8th edition, 222, 466; Case of *Fabrigas v. Mostyn*, in 11 State Trials; Case of *Money et al. v. Leach*, 3 Bur. 1742; Bul. N. P. 2d ed. 315.

"4. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly, indeed, it was doubted whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in *Downman's case*, 9 Co. 11 b; and the rule now holds both in civil and criminal cases, without exception; see *post*, 227 b; Staundf. P. C. 165 a; *Major Oneby's case*, 2 Ld. Ray. 1494.

"5. While attaints, which still subsist at law, were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprised of it by the judges, because, if they mistook the law they were in danger of an attaint. *Post*, 228 a; Hob. 227; Vaughan, 144; 2 Hale, H. P. C. 310; Gilb. Com. P. C. 2d ed. 128.

"6. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges, but they have a right to control the verdict and declare the law as they conceive it to be; at least, this is the language of some most respectable authorities. Staundf. P. C. 165 a; Plowden, 114, a, b; 4 Co. 42 b; 1 Hale, H. P. C. 471, 476, 477; 2 Hale, H. P. C. 302.

"7. The courts have long exercised the power of granting new trials in civil cases where the jury find against that which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that, on account of difficulty of law, there ought to be a special one. *King v. Poole*, Cases B. R. temp. Hardwicke, 26. Though, too, in criminal cases the judges do not claim such a discretion against persons acquitted, the reason, I presume, is, in respect of the rule, that *Nemo bis punitur, aut vexatur pro eodem delicto*; or the hardship which would arise from allowing a person to be

twice put in jeopardy for one offence ; and if this be so, it only shows that on that account, an exception is made to a general rule. 4 Bl. Com. 8th edition, 361 ; 2 Ld. Ray. 1585 ; 2 Str. 899 ; 4 Co. 40 a, and Wingate's Maxims, 695.

"Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law, is intrusted to the judges ; that in a jury, it is only incidental ; that, in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are, in some degree, controllable by them ; and therefore that in all points of law, arising on a trial, the jury ought to show the most respectful deference to the advice and recommendation of judges.

"In favor of this conclusion, the conduct of juries bears ample testimony ; for, to their honor be it remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his integrity by the misrepresentation and ill-practice of others.

"In civil cases, particularly, where the title of real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing ; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which depend more upon the evidence of facts, than any difficulty of law.

"Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a crime, is enabled by the general plea of not guilty, to have the benefit of a trial, in which the judge and the jury are a check upon each other ; and that this benefit may always be enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace ; which exception, from the necessity of the times is continually increasing ; but which, however, cannot be too cautiously extended to new objects.

"Thus considered, the distinction between the office of judge and jury, seems to claim our utmost respect. May this wise distribution of power, between the two, long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries."

The calm manner in which the subject is considered in the above opinion, adds as much to its weight as it derives from the high character of its author as a jurist.

Blackstone, in his Commentary, (vol. 4, p. 361,) speaking of

the right of juries, says, "They have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attain at the suit of the king, but not at the suit of the prisoner. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal."

And Lord C. J. Hale, (H. H. P. C. 313,) in speaking of the fine imposed upon the jurors, in *Bushel's case*, for not finding William Penn and others guilty, according to the direction of the court, says, "But it was agreed by all the judges of England, (one only dissenting,) that this fine was not legally set upon the jury, for they are judges of matters of fact; and although it was inserted in the fine that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were settled and stated, and agreed by the jury; and of such matter of fact they were the only competent judges. And although the witnesses might per chance, swear the fact, to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue; and possibly they might know the witnesses to be such as they could not believe; and it is the conscience of the jury that must pronounce the prisoner guilty, or not guilty. And to say the truth, it were the most unhappy case, that could be, to the judge, if he, at his peril, must take upon him the guilt or innocence of the prisoner: and if the judge's opinion must rule the matter of fact, the trial by jury would be useless."

Blackstone, in citing this passage from Hale, has materially altered the language of the last clause of the last sentence. He says, "For as Sir Matthew Hale well observes, it would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions. Unhappy also for the prisoner; for if the judge's opinion must rule the verdict, the trial by jury would be useless." Hale says, "rule the matter of fact." Blackstone says, "rule the verdict." Hale speaks of the judge's controlling the jury as to the fact only. Blackstone makes him speak of the judge's controlling the jury generally as to their verdict, which may be in matter of law, or matter of fact. This makes so great a difference in the case that Hale's language as cited by Blackstone, has been used in support of the supposed exclusive right of the jury to decide the law in criminal cases; (1 Erskine,

160,) whereas the language of Lord Hale, in his own book, affords no such support, but evidently tends to support the contrary doctrine.

To the authorities already cited we might add that of Mr. Dane, one of the most able and learned jurists of New England, who has given to the profession a most valuable abridgement and digest of American law in eight volumes, and founded a professorship of law in the Harvard University, and who from these circumstances may well be called the American Viner ; but we shall only refer to his able argument in his seventh volume, c. 222, Art. 18 and 19, p. 382.

Upon this point we will cite only one more authority. It is that of Mr. Justice Story, of the Supreme Court of the United States, in his opinion in the case of the *United States v. Battiste*, in the Circuit Court of the United States for the Massachusetts district, at October term, 1835. 2 Sumner's Rep. 243.

Mr. Justice Story, in summing up to the jury said :

"Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the argument of the learned counsel of the prisoner, upon which I have had a decided opinion during my whole professional life ; it is, that in criminal cases, the jury are the judges of the law as well as of the fact.

"My opinion is that the jury are no more judges of the law, in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary I hold it the most sacred, constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law ; and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen ; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it ; but in case of error there would be no remedy or redress by the injured party ; for the court would have no right to review the law as it had been settled by the jury. Indeed it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the

court should err in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land; the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness, or by ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege, and truest shield against oppression and wrong, I feel it my duty to state my views fully and openly on the present occasion."

From these authorities we think we may draw the following conclusions;

1. That the judges are to decide every question of law, when the facts, upon which the question arises, are found, or stated; and in all cases where, by the pleadings, or the proceedings, the law and the facts are separated. It has never been pretended that the jury are to decide a pure question of law unmingled with the facts. The law and facts are separated by a demurrer to the evidence; by a special verdict; by a special plea, and by the hypothetical statement of facts, when, in the trial of a cause before the jury, the Court is moved by the counsel on either side to instruct the jury as to the law arising from such supposed facts, if they should be found by the jury.

This latter proceeding is in the nature of an anticipated special verdict, and, as far as it goes, separates the law and the facts as completely as could be done by a special verdict actually finding the same facts.

This is a proceeding which either party has a right to adopt, if, in the opinion of the Court, sufficient evidence has been given in the cause to justify the party in assuming the legal possibility that the jury may find the facts to be as he has stated them in his motion for the instruction. This statement and motion to direct the jury upon the point of law, withdraw it from the jury and submit it to the judges, as in a special verdict; the only difference is that in the latter case the law is decided by the Court upon an actual finding, and in the former upon an assumed, or supposed finding; and the Court is as much bound to decide the question of law upon such a motion, as upon a demurrer to evidence, or a special verdict. This proceeding is applicable to criminal cases as to civil, and shows that the Court is the proper and exclusive tribu-

nal to decide the law in both classes of cases, whenever it can be decided without deciding the fact at the same time.

2. That the power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right, or implied a right, to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases; in both, the right and the power of the Court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law; thereby clearly showing that the jury has no right to decide the law in either case; but that the Court has. The most that can be said, is, that the jury has the power of rendering a general verdict upon the general issue, either according to law, or against law; but no one can suppose that they have a right to render a verdict against law. If in a criminal case they render a general verdict against the defendant, upon the general issue, against law, the Court will at once set it aside, because it is against law; but if the verdict be for the defendant, the Court, *in favorem vitæ*, will not set it aside, although against law; and this practice, or maxim, is probably grounded on the reasons before mentioned, and not upon the admission that the jury is the exclusive judge of the law, as well as of the fact, in criminal cases.

If the jury, as some have contended, "are the sole judges of the law in criminal cases," the prisoner, however erroneously the law may be laid down by the prosecutor to the jury, would have no more right to ask the Court to expound the law to them, than to ask the Court to ascertain the facts; and, if the verdict should be against him, would have no right to ask the Court to grant a new trial on the ground that the jury had either mistaken or disregarded the law. If juries are the exclusive judges of the law, in criminal cases, there can be no appeal, no writ of error, no new trial, even if the prisoner be convicted.

The act establishing the Criminal Court of this district provides for a writ of error to bring the cause into this Court. If the jury is to decide all the law, in criminal cases, their decisions of the law can never be reversed; for there are no means of ascertaining their decision upon a question of law, so as to bring it into review before this Court; but when the judge decides the law, a bill of exceptions may be taken, and his judgment, if against the defendant, may be either affirmed or reversed upon a writ of error.

In this very case, the defendant's counsel, by asking the Court to

instruct the jury as to the law, had admitted the right of the judge to decide the law.

Again, the same act establishing the Criminal Court, provides that that court may, in any case, with the consent of the person accused, adjourn any question of law to this Court, where it may be argued and decided. It is the court, and not the jury, who adjourn the question of law. It is to the court, therefore, that the question of law is to be made.

These provisions of the act establishing the Criminal Court, are totally inconsistent with the doctrine, that, in criminal cases, the jury are the sole judges of the law. They show, that when a question of law arises, either party may require the judge to decide it, or to adjourn it to this Court to be decided here.

3. If, then, it is the province of the judge to decide conclusively every question of law arising in the case, which may be judicially presented to him, unmixed with the facts; and if every question of law, arising in the trial of a cause, may be thus separated and presented to the judge, either by a demurrer to the evidence or a special verdict, or by motion to the Court to instruct the jury as to the law arising upon an hypothetical statement of such facts as the party supposes the jury may find from the evidence, it follows that it is not only the right but the duty of the judge to decide every question which may be thus presented to him; and, upon the motion of either party, to give to the jury, during the trial, such instruction and opinion upon the law arising upon such hypothetical statement of facts, as such supposed facts would justify him in giving, if found in a special verdict.

But the right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instruction as he may be asked to give. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law arising upon the whole evidence; leaving the question of fact entirely with the jury. This is the practice in the courts of England, and in those of many of the States of this Union.

Again: If it is the right and the duty of the judge thus to decide all questions of law which can be separated from the facts, the argument of counsel, upon such questions, should naturally and properly be addressed to the judge.

But it has been contended, that in a criminal case, upon the trial of the general issue, the counsel for the defendant has a right to argue the whole law of the case to the jury; and this is said to be a constitutional right.

The sixth article of the amendments to the Constitution of the United States declares, "That in all criminal prosecutions, the accused shall enjoy the right" "to have the assistance of counsel

for his defence." This is the whole constitutional provision upon the subject.

This amendment was, no doubt, adopted because, in England it was a settled rule of the common law, that no counsel should be allowed a prisoner upon his trial upon the general issue, in any capital crime, unless some point of law should arise, proper to be debated.

But the Constitution does not give the counsel a right to address the jury upon the questions of law, which may arise in the trial of the general issue in a criminal case. It only gives him that assistance of counsel which was denied by the common law.

The claim is, no doubt, founded upon the idea, that in criminal cases the jury are the sole judges of the law as well as of the facts, because, upon the general issue, they have the power, if they will, to find a conclusive verdict in favor of the defendant, contrary to law; and the judges are forbidden, by the humane maxim of the law, to set it aside. But in finding a verdict against the prisoner, upon the same issue, the jury are not the sole judges of the law; for if such verdict is contrary to law, in the opinion of the judges, they will set it aside and grant a new trial; so that the jury, at the same time, are, and are not, upon the trial of the same issue, in the same cause, the sole judges of the law and the facts; that is, if they are in any manner judges of the law, they are so only when they find a verdict for the defendant, on the general issue, but they are not so when they find a verdict against him. It is true that the Court cannot control the jury in giving their verdict, nor compel them to find a special verdict. The only remedy for a verdict contrary to law, is a new trial; for no appeal or writ of error lies from the verdict of a jury; but for a general verdict of not guilty, upon the general issue, in a criminal case, there is no remedy; for the process of attain is now obsolete in England, and, we believe, never has been resorted to in this country; certainly not in Maryland, whose common law remains the common law of this county, and who never adopted the English statutes on that subject. The only control exercised by the courts over juries is, to keep them together until they find such a verdict as will enable the court to render a judgment in the cause. But either party has a right to require the opinion of the Court upon every question of law arising in the trial of the cause, especially where a writ of error will lie to another tribunal. If the judge should expound the law correctly and the jury should find a general verdict contrary to such exposition, a writ of error would be of no avail. If the defendant, upon the trial, does not choose to ask the judge for an instruction to the jury upon the law of the case, and refuses to argue the question of law

to the Court upon an instruction asked by the Attorney of the United States, but insists upon arguing the whole law of the case to the jury, and the verdict should be against him, and contrary to the law as he understands it; upon what ground can he ask the Court for a new trial? Will he then contend that the jury had no right to decide the law? If so, he would be condemned out of his own mouth. He must say that the jury is not the proper tribunal to expound the law. Is it right, therefore, in the Court, to suffer the defendant's counsel to argue the law to the jury who, confessedly, have no right to decide the law against him? In theory and in principal we should say no. The good old maxim is still in force: "*Ad quæstionem facti non respondent Judices; ad quæstionem Juris non respondent juratores.*" But, in practice, it is allowed in the courts of England, and of some of these States; and it is upon this ground, namely, that as the jury may find a conclusive general verdict in favor of the defendant, upon the general issue, which involves both law and fact, they have a right to hear from the defendant, or his counsel, the defendant's construction of the law, and his reasons for such construction. Before the jury can apply the facts to the law which it is their peculiar province to do, they must know what the law is. They may ask the opinion of the Court, but they are not bound to do so. They have the power to take upon themselves the responsibility of judging for themselves as to the meaning of the law; or they may, if they will, but not of right, find a verdict against law; and such a verdict against law, if in favor of the defendant, will be as conclusive and effectual as if it were according to law. But the jury have no more right to find a general verdict against law, in a criminal case than in a civil.

According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the arguments of the defendant's counsel instructed the jury upon the law in the same case. But there are few, if any, courts of criminal jurisdiction, who will suffer counsel to appeal from the judge to the jury, upon a question of law which the court has decided against him after he has orally joined issue upon the question, and argued it before the court. This would be an indignity to which no court ought to submit. If the court has erred the defendant has a right to his writ of error, or to a motion for a new trial.

But when the counsel for the defendant declines to join in the issue of law to the court, tendered to him by the counsel for the prosecution, by his motion to the court to instruct the jury, this Court has permitted the defendant's counsel to argue the ques-

tion of law to the jury upon the general issue. This was done in the case of the *United States v. Fenwick et al.* indicted at March term, 1836, for a riot.

The court, in that case, after argument by the counsel of some of the defendants, had decided a question of law against them. The counsel for some of the other defendants offered to argue the same question of law to the jury, in opposition to the instruction which the court had given.

The court said, that after a point of law had been argued by the counsel of the parties, and the court had, at the request of either party, instructed the jury upon the point so argued, they could not permit the question of law to be re-argued to the jury, in opposition to the instruction given by the court. But, it appearing in that case, that the counsel who had argued the question of law to the court, were not counsel for all the defendants, the counsel for other defendants, who had not joined in the argument to the court, and who said they had objected to the court's giving any instruction to the jury on that point, until they had argued it to the jury, (although the court had not understood them as so objecting) were permitted to argue it to the jury—MORSELL, J., observing "that the court never denied the power of the jury to decide the law as well as the fact, in criminal cases, by finding a general verdict; but when either party has asked an instruction, and the other party has proceeded to argue the question before the court, and the court has given an instruction upon that question, the counsel has no right to argue the same question of law before the jury. If the party does not join in the argument to the court, but insists upon arguing it to the jury, the court will require him to proceed with his argument, and will, after the argument, give or refuse, such instruction, as the court shall think proper."

The counsel for those defendants then proceeded to argue the law to the jury upon the whole case; the counsel for the United States replied, and concluded by requesting the court to instruct the jury upon *the whole law of the case*, which the court did in their charge to the jury.

In the case of the *United States v. Charles Columbus*, at March term, 1837, after the court had given an instruction to the jury upon a question of law, the counsel for the defendant being about to argue to the jury against the instruction then just given, was stopped by the court, and informed that he could not be permitted to argue the point of law to the jury, against the instruction which the court had given them. The counsel contended that as he had not asked the opinion of the court upon that point he was not precluded from arguing it to the jury;—that in criminal cases the jury are judges of the law as well as of the fact, and therefore the law ought to be argued to them.

The court observed, "that this court had always refused to permit counsel to argue the question of law, after it had been decided by the court in the cause. That the jury has a right to find a general verdict, which includes the question of law as well as of fact; but the jury has no right to decide the question of law disconnected from the fact; that this point had been decided early in the existence of this court, upon full argument, and that such had been the uniform decision and practice of the court, from its commencement more than thirty years ago." (See the cases of the *Commonwealth of Virginia v. Zimmerman*, in Alexandria, at January term, 1802, *M. S.* and *Cotton's Case* at the same term.

4thly. That when the Court, after hearing the arguments of the parties, whether addressed to the court or to the jury, has instructed the jury upon the point of law, thus argued, the jury ought to respect such instruction, and not lightly substitute their own often crude expositions, or the sometimes wild or interested suggestions of counsel, for the deliberate, calm, and impartial opinion of judges, who ought to be, and generally are, selected for their knowledge of the law and their judicial integrity.

We say, in the language of Mr. Justice Story, already cited, "It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law as laid down by the Court. This is the right of every citizen, and it is his only protection;" and we say, also, in the language of Mr. Justice Baldwin, of the Supreme Court of the United States, in the case of the *United States v. Wilson and Porter*, 1 Baldw. 108: "Their judgment is final, *not because they settle the law*, but because they either think it *not applicable*, or *do not choose to apply it to the case*."

No person has more fully admitted, or rather insisted upon the right and the duty of the judge to instruct the jury in criminal causes, upon trial of the general issue, than Mr. Erskine, the great advocate of the rights of juries; and we refer to his printed speeches, vol. 1, p. 113, 114, 163, &c., and his whole argument upon the motion for a new trial in the case of *The Dean of St. Asaph*, indicted for a libel.

The Act of Parliament, 32 Geo. 3, c. 60, respecting the trial of prosecutions for libels, merely places such prosecutions on the same ground as other criminal trials, by authorizing the jury to find a general verdict on the general issue; but it expressly requires the judge who tries the cause, to give *his opinion or directions to the jury on the matter in issue*," "in like manner as in all other criminal cases."

Lord Mansfield, in delivering the opinion of the Court of King's Bench, in the case of *The Dean of St. Asaph*, 1 Erskine,

211, said : " Whether the fact alleged, supposing it to be true, be a legal excuse, is a question of law ; whether the allegation be true, is a question of fact ; and according to this distinction, the judge ought to direct, and the jury ought to follow the direction ; though, by means of a general verdict, they are entrusted with a power of blending law and fact, and following the prejudices of their affections or passions." And in p. 217, he says : " The fundamental definition of trial by jury, depends upon a universal maxim that is without exception ; *ad quæstionem juris non respondent juratores — ad quæstionem facti, non respondent judices*. Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the Court.

Where by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The Constitution trusts, that under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law. They are not sworn to decide the law ; they are not required to decide the law. If it appears upon the record, they ought to leave it there ; or they may find the facts subject to the opinion of the court upon the law. But further, upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. As I said before, they do not know, and are not presumed to know any thing of the matter ; they do not understand the language in which it is conceived, or the meaning of the terms. They have no rule to go by, but their affections and wishes. It is said that if a man gives a right sentence upon hearing one side only, he is a wicked judge, because he is right by chance only, and has neglected to take the proper method to be informed ; so the jury who usurp the judicature of the law, though they happen to be right, are themselves wrong, because they are right by chance only ; and have not taken the constitutional way of deciding the question.

" It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong ; which is a matter entirely between God and their own consciences."

Upon consideration, then, of the whole case as presented to us upon this writ of error, we are of opinion,

1. That the indictments are insufficient, because they do not charge any offence against the true construction of the statute, inasmuch as they do not aver the bank-bills, therein mentioned, to be " paper currency," or " paper medium evidently intended for common circulation," &c.

As the term "bank-bill" in the act is coupled with the words, "note," "check," and "draft," which, certainly, do not of themselves purport to be "paper currency;" and as, if the indictment had been for passing a note, check, or draft, only, it would, in our opinion, have been necessary to aver such note, check, or draft to be "paper currency," to bring the case within the prohibition of the statute, we think it is equally necessary to make the averment in regard to the term "bank-bill;" especially as the indictment does not set forth the bank-bill, nor describe it in any manner, so that the Court may judge whether it be paper currency, or not. There may be bills commonly called bank-bills, which are not the bills of any bank; as may, perhaps, be the case with the notes called, by the witness, (in No. 106,) "notes of Cohen's Bank."

2. That the special verdict (in No. 107,) is not sufficient to justify a judgment against the defendant, because it does not find that the defendant passed the bank-bill mentioned in the indictment. It only finds that the defendant gave, in change to the witness, a half dollar in silver, and two one-dollar notes, which the witness "thought it likely were Maryland notes," and that these notes were passed by the defendant to the witness, "in the manner, and at the time and place stated in the evidence."

We also think it insufficient, because it does not find that the notes were paper currency, which we think was necessary, for the reasons stated when considering the question of the sufficiency of the indictment.

3. That the judge erred, in the matter of his instruction, given at the motion of the Attorney of the United States in No. 107, for the reasons before stated; but that he did not err by instructing the jury, as to the matter of law, after it had been argued to the jury by the counsel on both sides; it being his right and duty so to do.

4. That the fact found by the jury in the special verdict upon the indictment No. 107, that "the treasurer was acting as the agent of the Baltimore and Ohio Railroad Company, chartered by Congress, is no bar to the prosecution, as they have not found that the company ordered or authorized him to pass the notes.

This observation will also apply to the instruction given in the other case, No. 106.

5. That there was no error in the refusal of the instruction in No. 106, that if the note "was passed by the traverser in payment of a *bonâ fide* debt due him to the witness, the act does not come within the prohibition of the law of Congress, and the traverser is entitled to a verdict of acquittal;" there being no such exception, express or implied.

6. That there was no error in the refusal to instruct the jury, that if the defendant passed the note "with intent that the same should be carried into Maryland, and not be circulated in the District of Columbia, the defendant is entitled to a verdict of acquittal."

The offence against the Act of Congress of the 7th of July, 1838, [5 Stat. at Large, 297,] does not consist in passing the notes, &c., with intent to circulate them; but in passing such notes, &c., of a less denomination than five dollars, as are paper currency at the time of passing them.

7. That the judge had a right, after the arguments of counsel had been heard, whether addressed to the judge or to the jury, to instruct the jury upon the whole law of the case; and this, either *ex mero motu*, or upon the motion of either of the parties. And if either of the parties or their counsel should pray the judge to give any particular instruction to the jury, it would be his duty either to give or refuse it; and if the defendant or his counsel should think the judge erred, either in the matter of his charge, or in giving or refusing the instruction prayed, he may have his bill of exceptions, and if the verdict should be against him, he may move for a new trial, or take his writ of error.

But the defendant's counsel have excepted also to the matter of the charge; the judge having therein stated, "That the jury would take upon themselves a very great responsibility, which they ought not to do, in deciding upon the law of the case in opposition to the opinion of the judge."

In this part of the charge we think there is no error, for the reasons which we have already stated.

But the charge proceeds; "And that they ought not to take upon themselves to render a verdict calculated to revoke the legislation of Congress, composed of many distinguished constitutional lawyers."

We think that the meaning of the judge, in this sentence, was, that the jury ought not to take upon themselves, in opposition to the opinion of the court, to decide an act of Congress to be unauthorized by the Constitution, and therefore not law. If this is the true construction of this sentence of the charge, we think there is no error in it.

The charge proceeds; "And it increases the responsibility of the jury so to decide, in this case, in favor of the defendant, upon the law, because the United States could not appeal, whereas, if they found the defendant guilty, he might appeal, and might have the law interpreted, and reverse the judgment if erroneous."

We see no error in this sentiment.

The judge, in his charge, further said, "that if the fact was

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proved, of passing the notes once, the case was brought within the Act of Congress."

The bill of exceptions does not profess to set out the whole charge of the judge. It is reasonable to suppose that this part of it was given in reference to the question whether it was not necessary for the United States to prove that the defendant circulated the notes, or whether the offence might be committed by simply passing the notes by the defendant to the witness.

In this view, the instruction was correct.

It is also suggested that the judge erred in stating in his charge, "that if the facts were proved to the satisfaction of the jury, the case was brought within the Act of Congress."

It does not appear what those facts were. But as this appears to be only an iteration of the opinion expressed in the first bill of exceptions, in the case No. 106, it is presumed that the judge alluded to the facts stated in that bill of exceptions. If so, we have already decided that those facts do not bring the case within the statute.

We think, therefore, there was error in this part of the charge.

We have thus endeavored to consider and decide all the questions suggested as arising upon this record; and the result of the whole is, that the judgments must be reversed, with directions to the judge to arrest the judgment upon each of the verdicts, on account of the insufficiency of the indictments.

THRUSTON, J., dissented, having previously delivered his opinion orally.

THE PATRIOTIC BANK v. BANK OF WASHINGTON.

Exceptions, to an answer, for insufficiency, may be filed after exceptions for impertinence.

BILL IN EQUITY. *Mr. Bradley*, for the plaintiffs, excepted to a part of the defendants' answer, for impertinence.

The COURT (*THRUSTON*, J., not sitting,) sustained the exception. *Mr. Bradley* then filed exceptions to the answer for insufficiency; and moved the Court for leave to amend his bill. *Cooper's Eq.* 321.

Mr. Hellen, *contrà*, objected that the exceptions should all be filed at once; and that after the Court has decided upon exceptions, new exception cannot be permitted. 1 Har. Ch. Pr. 228, 235.

Mr. Bradley, in reply. By the English practice, exceptions for impertinence must be first filed and decided before exceptions

for insufficiency will be allowed. Harrison refers only to exceptions for insufficiency. Chitty, Eq. Dig. 872; Newland's Ch. Pr. 184, 185, 190; Story's Eq. Pl. 665, p. 867.

The COURT, having sustained the exception for impertinence, ordered the impertinent part to be cancelled, and permitted the plaintiff to file exceptions for insufficiency.

EDWARD FENWICK v. GUY GRIMES.

A plea in abatement, not upon oath, may be treated as a nullity, and will be ordered to be stricken out.

A plea in bar overrules a plea in abatement.

The order of pleading is part of the common law, and does not depend upon a mere rule of the Court.

An action upon the case for deceit will lie against a person who by false and fraudulent representations induces the plaintiff to sell his female slave for less than her value.

AFTER the Court had arrested the judgment in this cause, and had refused to give the plaintiff leave to amend his declaration, [*ante*, 439,] it was, by consent, amended by adding a third count.

The defendant pleaded in abatement; the plaintiff objected that the plea was not put in upon oath. The defendant had also pleaded *non assumpsit*, and the statute of limitations.

The plaintiff's counsel, *Messrs. Brent & Brent*, moved to strike out the plea in abatement, for want of the oath and because it was overruled by the pleas of *non assumpsit* and limitations.

Mr. Key, for the defendant, contended that the plea in abatement, having been sworn to before any order for striking it out, was now good, and ought to stand; and that there was no rule of practice of this Court which prevented the defendant from pleading the general issue and a plea in abatement at the same time.

But the COURT (*nem. con.*) ordered the plea in abatement to be struck out. CRANCH, C. J., observing that the order of pleading was part of the common law, and did not depend upon any rule of this Court; and that, by the common law, a plea in bar of the action overruled a plea in abatement. That the plea in abatement, not on oath, may be treated as a nullity, and will be set aside unless sworn to when offered, or before the rule to plead under the special imparlance has expired.

There was a verdict for the plaintiff upon the third count, for \$150 damages, and a motion in arrest of judgment.

CRANCH, C. J., delivered the opinion of the Court.

This is an action upon the case for deceit. The deceit, in this

count, consists in the defendant's promise, which, at the time he made it, he did not intend to perform; by which promise the plaintiff was induced to sell the slave for less than her real value.

The Court had arrested the judgment upon the first and second counts, because in them the alleged deceit was in the non-performance of a promise on the part of the defendant, which the Court thought would not support an action upon the case for deceit, and that the plaintiff's remedy would be an action of *assumpsit*.

But in this new count, the alleged deceit is not in the non-performance of the promise, but in making the promise, *malâ fide*, without intending to perform it; and with the intent fraudulently to obtain the slave at an under price by abusing the confidence which the plaintiff reposed in him.

It substantially alleges that the defendant, fraudulently and deceitfully intending to remove the slave from this district, by selling her to a person who, he knew, was a trader in negroes, and whose professed business it was to transport negroes from this district to the southern States; and knowing that the plaintiff would not sell her but upon the consideration of her being kept within this district, and that the plaintiff was willing to dispose of her, at an under price, to a master residing in the district, and who would engage that she would not be sold away to southern negro-traders, fraudulently came and represented that he desired to purchase the slave; and, if sold to him, he would undertake that she should not be removed out of the District of Columbia; and thereupon, falsely, fraudulently, and deceitfully declared, protested, and engaged that the said slave should not be removed out of the said district, &c., by reason of which false and deceitful representations, the plaintiff was imposed upon, and prevailed with, to sell the said slave at much less than her real value; and relying upon the said representation and promise and engagement of the defendant, did sell and deliver to him the said slave for \$400, when her real value was at least \$600, and that the defendant did sell her to a southern negro-trader, who took her away out of the district to foreign parts unknown to the plaintiff, &c.

It avers that the said representations, declarations, and promises of the defendant, were utterly false and deceitful, and that at the time he made them, he fraudulently and deceitfully intended and designed to remove the said slave, &c.

In this consists the deceit, and we think it is sufficiently set out in this count; especially after a general verdict for the plaintiff, by which the jury have found all the material facts therein averred.

We are, therefore, of opinion that the motion in arrest of judgment must be overruled.

Mr. Key, for the defendant, in his argument, cited 2 Dane's Abr.

Ritchie v. Bank of the United States.

555, 556; *Paine v. Whale*, 7 East, 278; *Evertson v. Miles*, 6 Johns. 142; *Emerson v. Brigham*, 10 Mass. R. 202.

Mr. R. J. Brent, for the plaintiffs, cited Fitz. N. B. 224; Com. Dig. 351; 1 Roll. 101; Cr. Eliz. 79; *Ferguson v. Carrington*, 9 B. & C. 59; *Stafford v. Griffith*, 13 Johns. 327; *Price v. Reed*, 2 Har. & Gill, 91; *Adams v. Anderson*, 4 Har. & Johns. 558; *Oswald v. Lewis*, 2 Har. & Gill, 582; 1 Har. Evans, 318; *Cross v. Garnett*, 3 Mod. 261. See also, Dane's Abr. c. 62, art. 1, tit. Deceit; *Pasley v. Freeman*, 2 T. R. 51, 64; Com. Dig., Action on the Case for Deceit, A. 1; *Eyre v. Dunsford*, 1 East, 318; *Young v. The King*, 3 T. R. 100; Roll. Ab. 96, l. 32; 11 E. 4, 6; *Southern v. How*, Cro. Jac. 468; *Leakins v. Clissel*, 1 Sid. 146; *Elkins v. Tresham*, 1 Lev. 102; *Harvey v. Young*, Yelv. 20; 1 Roll. Ab. 101, l. 40; *Springwell v. Allen*, 2 East, 448, note a; S. C., Aleyn, 91; *Chandelor v. Lopus*, Cro. Jac. 4; Com. Dig., Action on the Case for Deceit, F. 2; Danver's Ab. 178; *Harding v. Freeman*, Styles, 310; *Shepherd v. Wakeman*, 1 Keble, 309; *Northcote v. Maynard*, 3 Keble, 807; *Michel v. Allestree*, 2 Lev. 172; Moore, 467, pl. 666; *Leakins v. Clizard*, 1 Keble, 510, 518, 522; Bro. Deceit, 29; 11 E. 4, 6; *Samuel v. Judin*, 6 East, 333; *Stuart v. Wilkins*, Doug. 17; 1 Chitty, Civil Pleading, 129, 130; *Evertson v. Miles*, 6 Johns. 138; *Shepherd v. Worthing*, 1 Aikin, (Vermont) Rep. 188; *Pickering v. Dowson*, 4 Taunt. 786; *Dickson v. Clifton*, 2 Wilson, 319; *Williamson v. Allison*, 2 East, 446; 2 Chitty, Civil Pleading, 679, 694, 704; *Govett v. Radnidge*, 3 East, 69; *Dawes v. King*, 1 Starkie, Rep. 75; 3 Campb. 156; 2 Dane's Ab. 553, ch. 62, art. 3; *Warren's Case*, 6 Mass. Rep. 72; *Dale's Case*, Cro. Eliz. 44; *Turner v. Brent*, 12 Mod. 245; *Medina v. Stoughton*, 1 Ld. Raym. 593; *Furnis v. Leicester*, Cro. Jac. 474.

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JOHN T. RITCHIE *et al.* Heirs at Law of Abner Ritchie, *v.* THE BANK OF THE UNITED STATES.

When lands of a deceased debtor are sold for payment of his debts, under a decree founded upon the Maryland Act of 1785, c. 72. § 5, the heirs at law are entitled to the rents and profits, until the day of sale; and if the decree, and the proceedings under it, including the sale, be set aside upon a bill of review, and a decree of restitution be obtained, while the heirs are infants, they may jointly maintain a bill in equity against the purchaser, or other party who has received the rents and profits; and are not obliged to sue for them separately at law. They have a right to an account and a discovery.

BILL IN EQUITY, and general demurrer.

The case was argued by *Mr. Marbury* for the plaintiffs, and *Mr. R. S. Cox* for the defendants, at this and the following term.

Ritchie v. Bank of the United States.

Mr. Marbury, for the plaintiffs, cited *Story's Equity*, 436, 447, 477, 487.

Mr. Coxe, for the defendant, cited *Ram on Assets, &c.* 377; *Law Library No. 23*, p. 249; *Davies v. Topp*, 2 Br. C. C. 260, note; *Story's Equity*, 89; *Pulteney v. Warren*, 6 Ves. 88.

CRANCH, C. J. delivered the opinion of the Court.

The bill states, in substance, that the complainants are heirs at law of Abner Ritchie, deceased, intestate, who died seized of real estate in this county, which descended to the complainants, and was sold under a decree of this Court, (while they were minors,) in a suit by the Bank of the United States and others, creditors of the said Abner Ritchie; bought in by John T. Ritchie, one of the co-heirs, and transferred by him to Richard Smith and David English, in trust for the Bank of the United States, and the Union Bank of Georgetown. That upon a bill of review, that decree, and all the proceedings under it, were set aside by a decree of this Court, affirmed by the Supreme Court of the United States, and restitution awarded. That after the affirmance by the Supreme Court, the property was restored, but the rents, issues, and profits accruing while the Bank of the United States was in possession under the first decree, were received by the bank, and never accounted for; and that the complainants have not the means of ascertaining, at law, the amount thus received by the bank, and they pray a discovery and account, and a decree for the amount which may be found due.

To this bill there is a demurrer, both as to discovery and relief:

1. Because the plaintiffs have, or had, their remedy at law by action of ejectment and trespass for the mesne profits.

2. Because they might have had their remedy upon the bill of review.

3. Because this Court has no jurisdiction of the cause, because there is no equity in the bill. The defendants are not bound to account, because there was no privity between them and the plaintiffs.

4. Because there is no ground for a bill of discovery, as the plaintiffs might have ascertained, from the tenants, the amount of rents paid by them to the defendant.

5. Because the plaintiffs have no right to bring a joint suit. At law, they must have brought their ejectments severally, and their several actions for the mesne profits.

Although these plaintiffs might, perhaps, have maintained their several actions of ejectment, yet they were not obliged to bring them, as they had a decree of this Court commanding the defendant to restore the lands, and might have enforced its execution by attachment. But the banks submitted, so far as the possession

was decreed to be restored, after which the plaintiffs had no cause of action of ejectment.

The bill of review did not authorize the plaintiffs to call on the defendants to account for the rents and profits; and, if it did, the plaintiffs were then infants, and not bound to enforce the right in that suit, and their not having done so is no bar to the present suit.

It is said that the plaintiffs have no equity; that their right, if any, is at law. But their claim arises out of a decree of this Court, by which they are entitled to have every thing restored to them, which they lost by the erroneous decree. The foundation of their claim is a decree in equity, in which they were joined as parties by these defendants, and by which they acquired a joint right of restitution. In a bill to carry that decree into execution, they were bound to sue jointly. Equity would not have permitted them to bring separate bills for their respective parts. It would have been deemed oppressive.

The defendants, having received the property of the plaintiffs while they were minors, are bound to account as if they were guardians. The law, as well as equity, in such a case, raises a privity, if privity be necessary to accountability.

The plaintiffs aver that they are unable, at law, to prove the facts of which they pray a discovery, and, for the purpose of this demurrer, that averment must be taken to be true; there is, therefore, ground to require the discovery which is sought.

We think, therefore, the demurrer must be overruled.

THOMAS CORCORAN'S EXECUTORS v. ROGER JONES.

In consideration that the plaintiffs, at the defendant's request, would sell and deliver to the defendant, for the price of six hundred and sixty dollars, two negroes of the value of two thousand dollars, as slaves for life, the defendant promised the plaintiff that he would not sell them to any person south of the Potomac, out of the District of Columbia, and would not remove them out of the District of Columbia, south of the Potomac, and that on such removal the said slaves should be immediately entitled to their freedom. The plaintiffs, relying on the said defendant's said promise, and in consideration of six hundred and sixty dollars paid to him by the defendant, sold and delivered the said slaves to the said defendant for that price. The defendant sold them to persons south of the Potomac, out of the District of Columbia, and removed them out of the District of Columbia, south of the Potomac.

Held, on demurrer, that the plaintiff had no cause of action against the defendant.

ASSUMPSIT. General demurrer to the declaration, which contained five counts.

1. The first count stated that the defendant, in consideration that at his request the plaintiffs would sell and deliver to him two

negro girls, one named Eleanor, of the value of \$1,000, and one named Julia Ann, of the value of \$1,000, as slaves for life, the first for \$350, and the other for \$310; the defendant promised the plaintiffs that he would not sell the said negro girls, nor either of them, to any person south of the Potomac out of the District of Columbia, nor remove the said negro girls, or either of them, to any place out of the District of Columbia south of the Potomac, and that, on such removal, the slaves shall be immediately entitled to their freedom. And the said plaintiffs in fact say that they, relying on the said promise of the said defendant, did, in consideration of the said sums of money, sell and deliver to the said defendant the said two negro female slaves, Eleanor and Julia Ann, to be held by the said defendant as slaves for life, upon the condition aforesaid.

2. The second count stated a conversation between the plaintiffs and defendant respecting the sale and purchase of the said two female slaves of the value of \$2,000, in which it was agreed that the plaintiffs should sell and deliver them to the defendant as slaves for life for the sum of \$660, upon the express condition that they should not be sold to any person south of the Potomac out of the District of Columbia, nor removed out of the said district south of the Potomac, but on such removal the said slaves should be immediately entitled to their freedom. And the said defendant, in consideration that the plaintiffs agreed to sell and deliver the said slaves to the defendant, for the price and on the conditions aforesaid, promised the plaintiffs that he would keep and perform the said contract and the said condition, and would not sell the said negro female slaves, or either of them, to any person south of the Potomac out of the District of Columbia, nor remove them, or either of them, out of the said district south of the Potomac; and the plaintiffs, relying on the defendant's said promise, did sell and deliver the said slaves to the defendant, as slaves for life, on the terms and conditions aforesaid.

3. The third count stated that the plaintiffs offered the said slaves, of the value of \$2,000, for sale at public auction to the highest bidder; upon condition, however, that the said slaves, nor either of them, should be sold to any person south of the Potomac out of the District of Columbia, nor removed out of the said district south of the Potomac; but, in case of their being so removed, the said slaves should be immediately entitled to their freedom. That the defendant attended the said public sale, and bid for and purchased the said slaves, subject to the condition aforesaid, for the sum of \$650, and received possession of the same, and in consideration thereof promised the plaintiffs that he would not sell the said slaves, or either of them, to any person south of the

Potomac out of the District of Columbia, nor remove them, or either of them, nor suffer them, or either of them, to be removed out of the said district south of the Potomac.

4. The fourth count stated that the plaintiffs advertised and offered the said slaves for sale at public auction, as, and upon the terms stated in the third count; that the defendant was present at the sale, and bought one of them, named Eleanor, of the value of \$1,000, at and for the sum of \$350; that she was delivered to, and accepted by the defendant, on the terms and conditions of the said sale, as set forth in the said advertisement; and the defendant, in consideration thereof, promised the plaintiffs that he would well and truly keep and perform the conditions of the said sale, and that the said slave should not be sold to any person south, &c., nor removed out of the District of Columbia south of the Potomac.

5. The fifth count related to the sale and purchase of the other of the two slaves, namely, Julia Ann, and was, in all other respects, exactly like the fourth count.

To these five counts there was this general conclusion: "Yet, the said defendant, not regarding his said several promises and undertakings so by him made in this behalf as aforesaid, but intending to injure and deceive the said plaintiffs in this respect, hath not kept and performed his said several promises and undertakings, but, on the contrary, hath knowingly sold the said several negro girls, hereinbefore mentioned, as slaves for life, to persons south of the Potomac out of the District of Columbia, and hath removed the said negro girls out of the District of Columbia south of the Potomac, to places remote therefrom, and unknown to the said plaintiffs. Wherefore, the said plaintiffs say they are injured and have sustained damage to the value of two thousand dollars, and, therefore, they bring suit," &c.

To this declaration the defendant demurred.

Mr. R. J. Brent and *Mr. Jones*, for the defendant, contended that it did not appear by the declaration, that the plaintiffs had sustained any damage; the penalty for breach of the contract on the part of the defendant was the freedom of the slaves; the defendant is not liable for damages besides. There was no consideration for the defendant's supposed promise. It is not averred that the plaintiffs sold them for less than their full value, in consideration of the defendant's promise. It was *nudum pactum*.

Mr. Marbury, for the plaintiffs, cited *Adams v. Anderson*, 4 Har. & Johns. 558; *Price v. Reed*, 2 Har. & Gill. 291; 5 Wheeler, 464.

The defendant contracted with the plaintiffs. He has broken his contract, and the plaintiffs are entitled to recover damages. The

Brown and Wife v. Corcoran.

freedom of the slaves is cumulative, and is no compensation for the plaintiffs' damage in selling the slaves so much below their value. Upon this demurrer, the facts are admitted that the slaves were worth \$2,000, and that in consideration of the defendant's undertaking not to sell or remove them as alleged in the declaration, the plaintiffs sold them to the defendant for \$660; the difference is the consideration of the defendant's promise. The penalty is for the benefit of the slaves, but they can have no remedy upon this contract. They can only get relief by the plaintiffs' compelling the defendant to manumit them, or pay damages for his breach of contract. It was not necessary for the plaintiffs to aver fraud on the part of the defendant.

The COURT, (CRANCH, C. J., not giving any opinion, as he had not had time to examine the declaration,) immediately rendered judgment for the defendant on the demurrer.

JAMES BROWN AND WIFE v. W. W. CORCORAN.

The reversioner cannot maintain an action upon the case against a stranger, who, by persuasion or threats, induces the tenant to attorn to a third person, it not being maliciously done.

ACTION UPON THE CASE.

The declaration averred that the east half of lot No. 2, in square No. 348, in the City of Washington, with buildings thereon, was in the possession and occupation of one Clement Woodward, as tenant thereof, to the plaintiff's wife, Sarah Jane, the reversion being still in her; that the defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the said Sarah Jane in her reversionary estate and interest in the said parcel of land and premises, while the same was so in possession and occupation of the said Woodward, as tenant thereof, to the said Sarah Jane, &c. entered thereupon, and falsely and deceitfully represented, &c. and threatened, &c. to dispossess the said tenant, unless he would acknowledge himself tenant of the Bank of the United States. The plaintiff then denies the truth of the representations thus made, and avers that the tenant, being deceived by the said false representations, and being also intimidated by the threats of the defendant to dispossess him as aforesaid, renounced his tenancy and holding from the said Sarah Jane, and acknowledged himself tenant to the said Bank of the United States, and refused any longer to pay rent for the said property to the said Sarah Jane.

There was a second count varying from the first, in the allega-

tions respecting the false representations and threats, but substantially like the first in all other respects.

To this declaration the defendant filed a general demurrer.

*Mr. R. S. Cox*e, for the defendant. The doctrine of attornment has nothing to do with this case. There is no injury to the freehold, or to the reversion; nor even a trespass upon the possession of the tenant. The act complained of, is not averred to have been done maliciously, and there was no force or violence; nothing but a conversation between the defendant and the tenant.

Mr. R. J. Brent, for the plaintiff, cited 1 Wheat. Selwyn, 371; 1 Saund. Ev. 335; 1 Com. Dig. 272, A, 404, 411; A No. 6; 1 Roll. Ab. 108, L. 2; 2 Wheeler, 569, § 16; *Egremont v. Fuller*, 22 Serg. & Rawle, 341; 1 Com. Dig. 279, Action, A; 2 Chitty, 778, from which precedent this declaration was drawn.

The COURT rendered judgment upon the demurrer, for the defendant.

WILLIAM EMACK v. HORATIO N. CRABB.

If the plaintiff in replevin never had previous possession of the goods replevied, the Court will, of course, order them to be returned to the defendant, on motion, upon the usual security.

REPLEVIN to get possession of goods conveyed by the defendant to the plaintiff by a deed of trust to sell them, in case a certain note should not be paid at maturity. The defendant now moved for a return of the goods.

Mr. May, for the defendant. The plaintiff never had possession, and therefore the Court will, of course, order the return; for it is only where the possession having been originally in the plaintiff, has been forcibly or fraudulently obtained by the defendant, that the Court is authorized, by the Maryland Act of 1785, c. 80, to refuse to order the return.

Mr. Hellen, *contrà*. When the note was due and unpaid the plaintiff had a right to the possession; and the possession of the defendant then became fraudulent.

The COURT, (THRUSTON, J. absent,) ordered the property to be returned, upon the usual security.

CHARLES WILKES v. WILLIAM P. ELLIOT.

With the leave of the Court, the plaintiff in ejectment may amend his declaration by a count upon a new demise, which count will be considered as the commencement of the suit as to the title claimed under that new demise.

Wilkes v. Elliot.

- A plaintiff in ejectment may recover without showing a possession, or a right of possession, or an entry, or a right of entry in his lessor within twenty years; no adversary possession being shown.
- A parol declaration by the lessor of the plaintiff, that he had not authorized the suit, is not competent to show the title to be out of the lessor of the plaintiff.
- The defendant's possession for twenty years, is no bar in ejectment, unless the defendant or the person under whom he claims, entered originally under color or claim of title; or unless, being in possession, he set up a color or claim of title hostile to that of the lessor of the plaintiff, more than twenty years before the commencement of the suit, and continued in possession ever since.
- But if the defendant, or the person under whom he claims, entered upon and inclosed the premises, more than twenty years before the commencement of the suit, without any recognition of the title of the lessor of the plaintiff, but claiming them as his own; and continued to occupy them until suit brought, the jury may infer that the possession was adverse; and if so the plaintiff cannot recover.
- A person who holds a bare possession of a lot in Washington, without evidence of any *bona fide* title, in fee, in law or in equity, (such possession being either adverse or tortious as to the legal title and estate of the lessor of the plaintiff, or subordinate to such title and estate,) cannot protect his possession, after paying previous taxes, by clothing it with the legal title, obtained by refusing to pay subsequent taxes, with intent to purchase the lot at the tax-sale.
- If the party, who calls for an account-book in the possession of the other party, examines it, he makes it evidence for such other party.
- A purchase at a tax-sale, and inclosed possession under it, give color of title.

EJECTMENT for lot No. 17, in the square No. 634, in the city of Washington. The original declaration was upon the demise of Charles Wilkes only; was filed on the 7th, and was served on the 30th of September, 1836. Three other counts were, by leave of the Court, filed on the 9th of April, 1839. One of them was on the demise of John G. Ladd; another on the demise of Joseph B. Ladd and Sarah Ladd, residuary legatees of John G. Ladd; and the fourth on the demise of Joseph B. Ladd.

The plaintiff claimed under John G. Ladd, who purchased the lot at a sale made under a decree of this Court, upon the foreclosure of a mortgage made to him by one Amariah Frost, who had a good title from the commissioners of the city of Washington.

The defendant relied upon twenty years' adverse possession, under a contract of sale by one Charles Glover, who purchased at the tax-sale on the 21st of December, 1812, and obtained a deed from the corporation in 1815.

This cause was submitted to the jury at April term, 1839, after several days' argument, but they could not agree, and were discharged by consent of the parties; and the cause was continued to the present term.

On the trial, *Mr. Coxe*, for the defendant, contended that the plaintiff must show Mr. Ladd to have been in possession within twenty years before the commencement of the suit; and that the title of the lessor of the plaintiff must be a subsisting title at the time of trial. 5 Wheeler, 19, 24; *Doe v. Fillis*, 2 Chitty, Rep.

170; *Johnson v. Morris*, 2 Halstead, 6; 1 Munford, 454; Bul. N. P. 106.

Mr. Coxe prayed the Court to instruct the jury, that the plaintiff cannot recover on the evidence stated; not having shown a possession, nor a right of possession, nor an entry, nor a right of entry, within twenty years.

But the COURT (THRUSTON, J., absent,) refused to give the instruction, no adverse title or possession having been shown.

The defendant then offered evidence of a conversation, in which Mr. Joseph B. Ladd, the lessor of the plaintiff, said he had not authorized his name to be used; but he did not know but that the Bank of the United States, to whom he had made a deed, would be authorized to use his name; and said further, that he then, (at the time of the conversation,) had no claim upon or interest in, the premises.

Whereupon *Mr. R. J. Brent*, counsel for the defendant, prayed the Court to instruct the jury, that the plaintiff cannot recover upon the demise of the said Joseph B. Ladd, if the title is shown to be out of him at the time of the demise.

But the COURT refused to give that instruction, being of opinion that the said oral declarations of the lessor of the plaintiff, were not competent evidence to show the title to be out of him; and if it were competent for the defendant to show the title to be out of the lessor of the plaintiff by parol declarations, those made by the plaintiff's lessor, as stated, were too vague to have that effect.

The defendant, having given evidence tending to prove twenty years' adverse possession by himself and his father, under whom he claims;

Mr. Bradley, for the plaintiff, prayed the Court to instruct the jury, that unless they should find from the evidence that Mr. Elliot, the defendant's father, originally entered into the possession of the said lot, claiming to hold the same under color and claim of title, either in his own right, or under the said Charles Glover, (who had purchased the lot at a tax-sale, and contracted to sell it to the said W. Elliot,) and exclusive of any other right; or, that being in possession thereof, without the assent of John G. Ladd, the ancestor of the lessor of the plaintiff, he the said W. Elliot in his lifetime, more than twenty years before the 9th of April, 1839, (the day on which the count upon the new demise under Joseph G. Ladd was filed,) set up a color and claim of title either in himself, or under the said Charles Glover, and exclusive of any other right, and that the said possession continued in himself and the defendant ever after; unless the jury shall find the said facts, the possession of the said W. Elliot in his lifetime, and the possession of the defendant, are to be deemed

and taken to be consistent with, and in subordination to the title of the lessor of the plaintiff, and do not constitute a defence to the present action.

Which instruction the Court gave; and also, at the prayer of *Mr. Coxe*, the defendant's counsel, instructed the jury that they might infer from the circumstances so in evidence before them, that the title claimed by Charles Glover and, after October, 1818, by W. Elliot and the defendant, was adverse to the title of the said Ladd, in its inception, and during its continuance, and exclusive of the title of any other party.

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury, in effect, that if the defendant and his father, under whom he claims title, have held possession of the lot adversely to the title of the lessor of the plaintiff, more than twenty years before the 9th of April, 1839, when the new count was filed upon the demise of Joseph G. Ladd, the plaintiff is not entitled to recover upon that count.

Which instruction the COURT gave; MORSELL, J., doubting, and THRUSTON, J., absent.

The defendant, having given evidence that the lot was assessed in his name, that he paid the taxes on the lot for the years 1820 and 1821, but that the taxes being in arrear and unpaid for the years 1822 and 1823, it was sold for those taxes, and purchased by his agent, John Lessford, who received a deed from the Mayor of Washington, and then made a deed of the lot to the said W. Elliot,

Mr. Coxe, for the defendant, prayed the Court to instruct the jury that if they should believe that evidence in relation to the sale for taxes, the plaintiff was not entitled to recover.

But the COURT refused to give the instruction.

Mr. Coxe, for the defendant, then prayed the Court, in effect, to instruct the jury, that if W. Elliot was in possession of the lot, claiming to hold the same in his own right, and adversely to any other person; and, with a view to fortify and secure his possession and title, he omitted to pay the taxes for 1822 and 1823; and that the premises were accordingly sold in 1825 for the said taxes, after due notice and advertisement, and purchased at such tax-sale for his benefit, such purchase was lawful, and the defendant, claiming under the said W. Elliot, is fully protected thereby; and the plaintiff is not entitled to recover.

Which instruction the COURT refused to give.

Mr. Jones, for the plaintiff, then prayed the Court to instruct the jury, that if, when the taxes were assessed and in arrear as aforesaid, and when the lot was advertised and sold for taxes, as aforesaid, the said W. Elliot held the bare possession of the said

lot, without evidence of any *bonâ fide* title in fee, at law or in equity, to the same, and that such possession was either adverse or tortious, as to the legal title and estate of the said John G. Ladd, or his devisee, the lessor of the plaintiff; or was subordinate to such title and estate, and that the said Elliot, after having paid the said taxes so assessed for the years 1821 and 1822, purposely and designedly suffered the said taxes to fall in arrear as aforesaid, to the end of having the said lot so sold for such taxes, and of procuring the same to be bought in for him, with the intent, purpose, and design of clothing such his adverse and tortious, or subordinate possession with the legal estate, and of defeating and divesting the legal title and estate of the said John G. Ladd, or of his said devisee, then such sale for taxes, and such conveyances in execution of such sale were inoperative so as to clothe such bare possession of the said Elliot with the legal estate, and thereby to divest and defeat the legal title and estate of the said J. G. Ladd, or his said devisee.

Which instruction the COURT gave.

The COURT decided, that if the plaintiff examines the account-book called for by him, in the possession of the defendant, he makes the book evidence for the defendant.

Mr. Coxe, for the defendant, further prayed the Court to instruct the jury, in effect, that if the said Glover purchased the lot at a tax-sale in 1812, and W. Elliot entered into and inclosed the same in 1815, or in the spring of 1816, claiming the same under a contract, verbal or written, with the said Glover; and the said W. Elliot, and the defendant claiming by conveyance from him, has ever since held the same under inclosure, claiming it as his own, then the plaintiff is not entitled to recover.

Verdict and judgment for the defendant.

HENRY BRADLAY AND WIFE'S LESSEE v. MARY ANN CONNER.

A tax-sale of part of a lot in the city of Washington in December, 1835, was held to be void, because the number of the lot, of which the premises in dispute were a part, was not mentioned nor stated in the advertisement of the sale, as required by the Charter of Washington of 1820, § 10, and the Act of 26th of May, 1824.

If there be a lease for years, with right of reëntry for non-payment of rent, and six months' rent be in arrear, and no sufficient personal property on the premises to countervail the rent arrear, the lessor may, under the statute of 4 Geo. 2, c. 28, which is in force in the county of Washington, recover in ejectment, as if he had made a strict demand of the rent, and had entered.

But the lessor cannot recover while the lease is in full force; and it is in full force, unless forfeited by the right of reëntry, and the proceeding to serve a declaration in ejectment according to the provisions of that statute; six months' rent being arrear and not sufficient goods on the premises to countervail the rent.

EJECTMENT for "a certain piece or parcel of ground in the city

Bradlay v. Conner.

of Washington and county aforesaid, and being part of square numbered 906 upon the plan of the said city, beginning for the said part thirty-four feet north from the south-west corner of the said square, at the intersection of L street south, and 7th street east, and running thence on the line of said 7th street east, thirty-five feet north; thence east thirty feet; thence south thirty-five feet; thence west thirty feet to the beginning."

On the trial of the cause, it appeared that William Prout, being seized in fee of the premises, on the 20th of February, 1807, demised the same to Joseph B. Parsons for ninety-nine years, renewable forever, at the annual rent of \$35, clear of all taxes, &c., with leave to purchase the fee-simple upon payment of \$196.87, with a clause of reëntry for non-payment of rent. Parsons entered under the lease and continued in possession, paying the rent and the taxes, until his death in 1813, leaving a widow who remained in possession, and several children, of whom the defendant is one.

The widow continued in possession until the death of Mr. Prout in 1823, having previously paid him \$100 on account of the purchase of the fee-simple. Some time after his death she abandoned the possession of the premises to the defendant, who took possession thereof, claiming to hold the leasehold estate with the knowledge and consent of the widow and the other children of Parsons, and paying the rent and taxes. In 1831, by a partition among the children of Mr. Prout, the premises were assigned to Mary Bradley, one of the lessors of the plaintiff, to whom the defendant thereafter paid the rent, but neglected to pay the taxes to the collector, for the years 1831, 1832, 1833, and 1834, amounting to \$44.13, and suffered the premises to be sold for that amount, and the expenses of sale by the collector, to one Allison Nailor, who obtained a certificate of purchase, which he assigned to the defendant; but the assignment was afterwards cancelled, and after the expiration of the time for redemption, the said Nailor conveyed the premises to the defendant in fee-simple, who thenceforth claimed to hold the same as a fee-simple estate in her own right, and adversely to the lessors of the plaintiff.

At the time of the commencement of this suit, more than six months' rent was in arrear, and no sufficient goods were on the premises to countervail the rent arrear.

In the collector's advertisement of the sale of the property for the non-payment of the taxes, it is described thus: "To whom assessed. Parsons, Joseph B.; heirs of; Square 906; part, and imp. Beginning thirty-four feet from the south-west corner of said square, running thence north," &c. &c. as before stated.

The COURT refused to instruct the jury, at the prayer of the

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defendant, that the plaintiff could not recover upon the evidence given on his part; and at the prayer of the plaintiff instructed the jury, "that if they should be of opinion from the evidence aforesaid, that the heirs of the said Joseph B. Parsons, in the said advertisement named, were not at the time of the publication of the said advertisement, the true and actual lawful owners of the premises advertised in their name as aforesaid; that the said Square No. 906, had, before that time been divided into lots, and that the number of the lot, of which the said premises were a part, was not mentioned nor stated in the said advertisement, then the said tax-sale of the said premises, was void, and the aforesaid deed from the Mayor of the city of Washington to the said Addison Nailor, furnishes no ground of defence in this action."

Mr. Bradley, for the plaintiff; *Messrs. Brent & Brent*, for the defendant.

Verdict and judgment for the plaintiff.

 GEORGE SUCKLEY v. HENRY C. SLADE.

A person in Alexandria county, D. C., is not "beyond seas," within the meaning of the Act of Limitations, in regard to persons residing in Washington county; the residence of the defendant in Alexandria county may, therefore, be added to his residence in Washington county, so as to enable him to plead, in Washington, the Maryland statute of limitations of "twelve years standing," to a bond.

DEBT on a bond in the penalty of \$9,794, dated 18th of April, 1820, conditioned to be void upon the defendant's paying to the plaintiff one third of the debt due by the defendant's father to the plaintiff if he himself should not pay the whole debt on or before the 1st of January, 1822.

A verdict was taken for the plaintiff, subject to the opinion of the Court, upon the following state of the case:

On the trial of this cause it was agreed that the following state of facts be submitted to the Court as if found by the jury in the shape of a special verdict.

The contract upon which the suit is brought is as set forth on oyer. It was executed, at the time it bears date, in Alexandria county, D. C. That at said date, and from that time to the institution of this suit, the plaintiff resided in, and was a citizen of, the State and city of New York. That from the date of said contract, and until the year 1824 or 1825, the defendant was a resident of Alexandria. In 1824 or 1825 he removed to Fairfax county, in Virginia, where he resided until 1829 or 1830, when he removed to the county of Washington, where he has since

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resided. That while the defendant so resided in Alexandria and Virginia, he was in the habit of occasionally visiting the county of Washington during each year. That the plaintiff was in the habit of visiting the District of Columbia once or twice a year, spring or fall, from 1818 to 1824, on business, and remaining, at each visit, in said district for several days, part of which he spent in the county of Washington, and the residue in the county of Alexandria. In particular, that in April and September, 1822, he so came into the said district, and both of said counties, and continued in the said district several consecutive days, and in Alexandria from the 5th to the 9th of April, 1822.

And if upon such state of facts the Court shall be of opinion that the plaintiff is entitled to recover, then judgment to be entered for the plaintiff; and, if for the defendant, then judgment for the defendant.

The question submitted was, whether, under the circumstances so stated, the plea of the Act of Limitations of Maryland, 1715, c. 23, § 6, "that the debt" was "above twelve years' standing," was a good defence to this action.

Mr. R. S. Cox, for the plaintiff, contended that the condition of the bond was for a continuing guaranty, and, therefore, the statute of limitations did not apply to the case; and that it was incumbent on the defendant to show that he had resided in Washington county the whole twelve years. That Alexandria county, being governed by a different code of laws, was to be considered as foreign to Washington county. That the defendant, while residing in Alexandria county, is to be considered as "absent out of this province," (within the meaning and true construction of the Maryland Act of November, 1765, c. 12, § 2,) when the cause of action accrued, and that he could not be considered as present in the province, within the third section of that act, until he came into the county of Washington.

Mr. R. J. Brent, for the defendant, cited the case of *The Bank of Alexandria v. Dyer*, in this Court, at March term, 1838, (*ante*, 403,) in which this Court decided that Alexandria county was not "beyond seas," within the true construction of the Maryland Act of Limitations, (which decision has been since affirmed by the Supreme Court, in the same case, 14 Peters, 141.)

The COURT (MORSELL, J., *contrà*,) rendered judgment for the defendant, upon the case stated, being of opinion that the time of the defendant's residence in Alexandria may be added to his residence in Washington, so as to give him the benefit of the Maryland statute of twelve years' limitation.

UNITED STATES v. JAMES WILLIAMS.

The President of the United States has authority to order advances of money to be made by the Secretary of the Treasury to the Marshal of the District of Columbia; and such advances may be presumed to have been made under the special direction of the President; and the sureties of the marshal are liable therefor.

The Marshal of the District of Columbia and his sureties are liable to account for all common-law fines and forfeitures received by the marshal, whether on execution or otherwise. But he is not liable upon his bond for executions not returned; nor, in this action, for escape of persons taken and in his custody on *ca. sa.*, for fines, &c., whether prayed in commitment in execution or not.

DEBT on the official bond of Henry Ashton, late Marshal of the District of Columbia.

The breaches assigned were, first, for not accounting for the sum of \$6,455.16, advanced to him as marshal; second, for not accounting for certain common-law fines and forfeitures received by him; third, for not executing certain writs of *fi. fa.* and *ca. sa.* put into his hands; fourth, that he suffered certain persons, taken and in his custody on *ca. sa.* for fines, &c., to escape.

Mr. R. S. Coxe, for the defendant, contended that by the "Act concerning the disbursement of public money," 31st January, 1823, c. 9, (pamphlet, p. 7,) all advances of money are prohibited, except to "disbursing officers of the government," "under the special direction of the President of the United States;" and then only so much "as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements." That the marshal was not such a disbursing officer as is contemplated by the act. The only money he is to disburse is for the expense of holding the courts, &c., which, by the Act of May 8, 1792, § 4, is to be paid to the marshal at the Treasury, after having been examined and certified by one of the judges of the court; after which he is to "pay over" the same to the persons entitled thereto. That act does not contemplate any advance of money to the marshal. Besides, there is no evidence of any special direction of the President to make this advance. It was, therefore, money illegally advanced, and the sureties are not liable therefor.

Mr. Key, for the United States, *contra*, admits that there is no paper in the departments showing the order of the President to advance money to the marshal, but the order of a head of a department is to be considered as the order of the President. It was in fact made by the Secretary of the Treasury, whose acts must be presumed to be lawful until the contrary appears. The marshal is clearly a disbursing officer. It could never be expected that he should himself advance all the expenses of holding

the courts in the district, and the uniform practice, ever since the commencement of the government has been to advance money to the respective marshals, to be accounted for at the Treasury.

The COURT (*nem. con.*) was of opinion that the order of the Secretary of the Treasury may be presumed to be under the special direction of the President; that the advance was legally made, and that the sureties were liable.

The COURT, also (*nem. con.*) decided that the marshal and his sureties were liable, on his bond, for all common-law fines and forfeitures received by him, whether upon execution or without execution. See the Maryland law of 1795, c. 74, and the Act of Congress of March 3d, 1801, [2 Stat. at Large, 103.]

The COURT also decided that the marshal was not liable, upon his bond, for writs of *fi. fa.* paid into his hands against persons who had goods, &c. sufficient, &c.; and writs of *ca. sa.* against persons able to pay; the executions not having been returned.

The COURT also decided, that the defendant is not liable in this action for the escape of persons taken and in custody on *ca. sa.* for fines, &c., whether prayed in commitment in execution or not.

Verdict and judgment for the plaintiff.

Both parties took bills of exception.

UNITED STATES, for the use of John W. Gody, v. JACOB A. BENDER.

In debt upon a guardian's bond taken by the Orphans' Court of the county of Washington, this Court refused to permit the defendant to show by testimony that no land descended nor was devised to the orphan in that county, and that he was not entitled to a distributive share of the personal estate of any intestate, or to a legacy or bequest under a last will and testament of any person on whose personal estate any administration had been granted in that county, and that no friend of the orphan had applied to the Orphans' Court to require the guardian to give bond; in order to show that that court had not authority or jurisdiction to take the bond. A guardian here is liable to account for money of his ward received in Maryland for land sold in Maryland.

If a guardian receive a promissory negotiable note in payment of a debt due to his ward, such guardian is liable for the same to his ward, although the money has not been received by him.

DEBT against the defendant as surety in a bond given by Walter Gody, (the father and natural guardian of John W. Gody,) by order of the Orphans' Court of the county of Washington.

Upon the trial, *Mr. Bradley*, for the defendant, in order to show that the Orphans' Court had no jurisdiction or authority to require and take the bond, offered evidence to prove that no land descended nor was devised to the orphan in that county, and that

he was not entitled to a distributive share of the personal estate of any intestate, or to a legacy or bequest under a last will and testament of any person on whose personal estate any administration had been granted in that county; and that no friend of the orphan had applied to the Orphans' Court to require the guardian to give bond for the performance of his trust.

But the COURT (MORSELL, J., *contrà*,) refused to permit such evidence to be given.

Mr. Bradley then prayed the Court to instruct the jury, that if from the evidence, they should believe that the money was received by the said Walter Gody, (the guardian,) in Maryland, the plaintiffs cannot recover in this action.

Which instruction the Court refused to give.

Mr. Bradley further prayed the Court to instruct the jury, that if from the evidence they should find "that the money was not paid to, nor received by the said Walter Gody, his agent or attorney, the plaintiff is not entitled to recover."

But the COURT refused to give the said instruction unless with this addition; namely, "unless the jury should be satisfied by the evidence that the said note was given by the said Cox to the said Walter Gody, and by him received in satisfaction of the money which the said Cox was ordered by the Orphans' Court of Charles county in Maryland, to pay over to the said Walter Gody as aforesaid."

Mr. Marbury and *Messrs. Brent & Brent*, for the plaintiffs.

Mr. Bradley and *Mr. Fendall*, for the defendant, upon the question whether the defendant was liable for money received by his principal in Maryland, cited *United States, use of Beale v. Nicholls*, in this Court at March term, 1833, (4 Cranch, C. C. 290;) *Kraft v. Wickey*, 4 Gill & Johns. 332; *Burch & Mundell v. State*, Id. 452; *Williams v. Storrs*, 6 Johns. Ch. Rep. 353; *Muir v. Wilson*, 1 Hopkins's Ch. Rep. 512; *Minor v. Mechanics Bank*, 1 Peters, 46, 3d Instruction; *Miller v. Stewart*, 9 Peters, 608; *United States v. Jones*, 8 Peters, 418, 419; *United States v. Bradley*, 10 Peters, 351; Story's Conflict of Laws, 414, 415; Robertson on Succession, 76, 345, 346; Act of Congress, 24th of June, 1812; *Fenwick v. Sears*, 1 Cr. 259; *Genet v. Tallmadge*, 1 Johns. Ch. Rep. 5.

Mr. R. J. Brent, contrà, cited the cases in 7 Johns. Ch. Rep. General Index, p. 105.

Verdict for the plaintiff. The defendant took bills of exception, and writ of error, but did not prosecute it.

UNITED STATES v. THOMAS N. DAVIS.

If the return to a writ of *habeas corpus* be evasive and insufficient, the party refusing to produce the bodies of the prisoners, if present in court, will be committed until he produce them, or be otherwise discharged.

If, when produced, the prisoners appear to be held as slaves, and claim to be free, and file their petitions for freedom, the person claiming them as slaves will be required by the Court to give security for their forthcoming to prosecute their claim for freedom; and if he fail to give such security the Court will order them to be taken into custody of the marshal for safe keeping until their trial, or the further order of the Court.

Habeas corpus ad subjiciendum, (issued on the 14th of January, 1840,) directed to Thomas N. Davis, commanding him to have before the Court, the bodies of Israel Brinkley, Emanuel Price, and Maria Course, persons of color, with the cause of their detention.

The return of the writ by Davis, stated upon oath, that he purchased the three negroes publicly, in the bar-room of Thomas Lloyd's tavern, in the city of Washington, as slaves for life, from one Joseph Woodall, on the 31st December, 1839, and took from him a bill of sale, warranting the title to the negroes, and that they were slaves for life; which bill of sale he produces as part of his return. That he paid for them the sum of \$1,200, which he avers to be a reasonable price for them. That he had never any reason to doubt that they were slaves for life, as they were warranted to be.

The undersigned avers that the said individuals were removed, as he believes, beyond the District of Columbia, before the service of the said writs of *habeas corpus*, and before the undersigned heard of the existence of such process; and that the said individuals are now beyond the control, and out of the custody of the undersigned, and, as he believes, beyond the District of Columbia.

A number of witnesses were sworn and examined, whose testimony tended to show that Davis had removed the negroes, because he suspected they would apply for a writ of *habeas corpus*.

Mr. Key, for the prisoners, contended that the answer was insufficient and evasive. It does not deny that the prisoners are in his power; or that he is unable to produce them.

Mr. Key, therefore, moved the court for an attachment against him, and cited *The King v. Winton*, 5 T. R. 89. The sending the prisoners away with intent to avoid the expected process of this Court, is of itself an obstruction of justice, and a contempt of court.

Mr. Hoban, *contrà*, contended, that the return was a sufficient excuse for not bringing in the bodies of the prisoners, and cited *Ex parte Samuel Stacy*, 10 Johns. 328.

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The COURT, (THRUSTON, J. absent,) after stating the writs of *habeas corpus* and return, made the following order :

“ The Court, having examined and considered the return of the said Thomas N. Davis, to the writs of *habeas corpus* aforesaid, and having heard counsel thereupon do adjudge the said answer to be evasive and insufficient, and that the said Davis is bound to produce the bodies of the said negroes, mentioned in the said writs, before the Court ; and the said Davis being now present in court, and refusing to produce the said negroes, it is therefore, this 16th day of January, 1840, ordered that the said Davis be committed to the custody of the marshal, until he shall produce the said negroes, or be otherwise discharged in due course of law.”

On the 18th of January, 1840, it was further ordered by the Court, that, “ in case the said Emanuel Price and Maria Course shall be surrendered by the said Thomas N. Davis, or by any other person for him, to the marshal, he shall take the said negroes into his custody, subject to the further order of the court, and that he then discharge the said Davis from jail.

The negro Israel Brinkley had run away, and had been taken up and lodged in jail in Baltimore. On the 20th of January, 1840, being the last day of the term, the said Davis having brought into court the negroes Emanuel Price, and Maria Course, the Court made the following order :

“ Emanuel Price and Maria Course being in court, and having filed their petition for freedom against a certain Thomas N. Davis, to March term next, and the said Davis being present in court, and the court having required the said Davis to enter into recognizance, in the sum of \$1,000, that he would not remove the said negroes out of the jurisdiction of this Court, until their right to freedom shall be tried, and a decision thereon had, and the said Davis having refused to give such recognizance ; it is therefore ordered that the said negroes be committed to the marshal of this district for safe-keeping, until the further order of the Court in the premises.” See Maryland Laws of 1796, c. 67, and 1796, c. 43, § 5.

These negroes afterwards established their right to freedom, and were discharged ; their jail fees being charged to the United States, and settled in the marshal's accounts.

SAMUEL H. SMITH v. JAMES L. ADDISON.

John Addison having been appointed by the Washington National Monument Society, collector of subscriptions, in the State of Kentucky, gave bond to the plaintiff, treasurer of that society, with the defendant and others, his sureties for the faithful

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execution of the trust, and to account, &c. "for which services," says the condition of the bond, "he will be entitled to a commission of 10 per cent." &c.

The society, afterwards, without the consent of his sureties, agreed to allow him an additional commission of five per cent., provided the amount collected should be equal to, or exceed ten cents on each white inhabitant of the State; Held, that such agreement for an increased commission did not discharge the sureties in the bond; that the bond covered the collections of the second year as well as the first, although, by the condition, he was to make his final return, and close his collections in one year from the date, unless the society should extend the time; and that he had no right, under the contract, to set off his expenses.

DEBT upon a bond for \$5,000, given to the plaintiff, as treasurer of the Washington National Monument Society, by John Addison, and the defendant James L. Addison and others, his sureties, with condition that the said John Addison, who had been appointed by that society, collector of contributions in and for the State of Kentucky, should use his best endeavor to collect from all the white inhabitants of that State, such contributions as they should be willing to make for the erection of a great national monument to the memory of Washington, at the seat of the federal government, &c. &c., and should account, &c., and make his final return, and close his collections in one year from the date of the bond, unless the society should extend the time; and in all things well and faithfully execute the trusts reposed in him, &c., "for which services he will be entitled to a commission of ten per cent. upon all moneys which he shall have transmitted, deposited, or paid over to the treasurer of the said society."

The defendant's 2d plea was, in substance, that after giving the bond, it was resolved by the society, and agreed to by the plaintiff, that the collector should be allowed 15 per cent. on the amount deposited by him to the credit of the treasurer of the society within twelve months from the date of the bond, provided the sum so collected should be equal to, or exceed ten cents on each white inhabitant of the State. That the said John Addison, the collector, agreed to the same, but that the defendant had no notice thereof and did not consent thereto; and that this agreement is different from the condition of the bond, by which he was to receive a commission of ten per cent.

To this plea there was a general demurrer, and joinder.

Mr. Wm. M. Addison, for the defendant, contended, that the sureties were exonerated by this new agreement without their consent. Although it was intended for the benefit of the collector, yet it was injurious to the sureties, because the additional commissions induced the collector to continue in office, whereby he received more money than he would otherwise have received, and increased the responsibility of the sureties. The general rule is, that any material alteration of the contract exonerates the sureties

although beneficial to them. *Miller v. Stewart*, 9 Wheat. 703 ; S. C., 4 Wash. C. C. 26 ; *Rees v. Berrington*, 2 Ves. Jun. 542 ; *Walsh v. Bailie*, 10 Johns. 181, 182 ; *Ludwell v. Simon*, 2 Caines's Cases in Error, 49, 50 ; *United States v. Nichol*, 12 Wheat. 510 ; *Rathbone v. Warren*, 10 Johns. 586 ; Co. Lit. 232 ; *Eppes v. Randolph*, 2 Call. 125.

The new agreement was upon good consideration, the continuance of the collector in office.

Mr. Addison, having given notice of the set-off, contended that the defendant had a right to charge the society with his travelling expenses, &c. The commission is only for his personal services. Expenses of agency are always to be charged to the principal, unless there be some agreement to the contrary. *Green v. Winter*, 1 Johns. Ch. Rep. 37, 38 ; *Fearns v. Young*, 10 Ves. 184 ; *Bonithon v. Hockmore*, 1 Vern. 316 ; *Dean v. Angus*, Bee's South Carolina Rep. 475.

Mr. R. J. Brent, same side, contended, that the sureties were not liable for the collections of the second year. There is no allegation that the society extended the time. The new contract turns the whole into a parol contract. No action can be maintained upon the bond, even against the principal. *Latimere v. Harsen*, 14 Johns. 330 ; *Brown v. Goodman*, 3 T. R. 592, note b. ; *Heard v. Wadham*, 1 East, 630 ; *Ousterhout v. Day*, 9 Johns. 115.

Mr. Smith and Mr. Bradley, *contra*, contended that the additional five per cent. allowed by the society was a mere gratuity, not a contract, nor a variation of the contract, and was without consideration. *United States v. Nichol*, 12 Wheat. 510 ; *Lemore v. Powell*, 12 Wheat. 554 ; *United States v. Tillotson*, 1 Payne, 320.

The defendant has no right to charge his personal expenses to the society. The commission of 15 per cent. was to cover all his expenses. Besides, there is no privity between the surety and the principal which will authorize the surety to set off a debt due to his principal.

The COURT, (*nem. con.*) was of opinion that the subsequent allowance of the additional five per cent. did not avoid the bond or exonerate the sureties ; that the bond covers the collections made in the second year, as well as the first ; and that the defendant cannot set off his expenses.

The demurrer was withdrawn by consent, and upon the issue joined the plaintiff recovered a verdict ; upon which judgment was rendered for the penalty, to be discharged by the payment of \$150.83, with interest from the 1st of February, 1837, and costs

CIRCUIT COURT OF THE UNITED STATES.

MARCH TERM, 1840, AT WASHINGTON.

NEWTON *et al.* Appellants, *v.* LEWIS CARBERY, Executor of
Eloysa Mattingly, Appellee.

The Court, in forming its opinion as to the soundness of mind of a testator, will look rather to the facts upon which the witnesses may have formed their opinions, than to the opinions themselves, but will form its opinion from the whole evidence consisting of facts and opinions.

The influence which will set aside a will, must be undue influence. The influence of the general doctrines of the church, of which the testator was a member, is not such undue influence; nor can the holding of such doctrines be adjudged to be such delusion as will vacate the will. The Court has no jurisdiction to decide whether a doctrine, held by any particular religious sect, be true or false. A delusion common to all the members of a religious sect, will not avoid the will.

Upon an appeal from the sentence of the Orphans' Court sustaining a will, this Court has no jurisdiction to inquire into the validity of any particular legacy bequeathed by the will.

APPEAL from the sentence of the Orphans' Court for the county of Washington, which overruled a *caveat*, and admitted the will to probate.

On the 12th of February, 1839, the appellants filed, in the Orphans' Court, a *caveat* against the will of Eloysa Mattingly, which was, on that day, offered for probate, by the appellee, Lewis Carbery, who is named therein as sole executor. The will was dated on the 17th of December, 1838.

The *caveat* states that the appellants are the next of kin and legal heirs and representatives of the deceased, and are entitled to all her estate, real and personal, and to administration of her personal estate; and they object to the probate of the will;

1. Because the supposed testatrix was not "of sound and disposing mind, and capable of executing a valid deed or contract."

2. That she made it under undue influence operating upon her mind; and that it was not her own free will and consent.

3. That the bequests and devises therein named, or many of them, cannot be carried into effect, and are null and void.

By the will, the testatrix bequeathes small legacies, varying

from five to fifty dollars, to eleven of her relations, including the appellants; she then bequeathes to the Rev. Wm. McSherry, President of Georgetown College, \$100, to be distributed equally among the clergy of the said college for the purpose of having masses offered up for the repose of her soul. She then makes the following bequests, namely:

Her sideboard to the Rev. Mr. Lucas, pastor of Trinity Church, for the use of the said church. To the pastor of the Catholic Church at Newtown in St. Mary's county, ten dollars, one half to go to the poor of that congregation and the other for masses for her soul. She then gives ten dollars each, to the archbishop of Baltimore; bishop Fenwick of Boston; to the pastors of Trinity Church in Georgetown, (where she resided and died;) to the Rev. S. L. Dubuisson, and eighteen other priests and societies, &c.

On the 15th of February, 1839, the appellee appeared and denied the allegations of the *caveat*, and asserted the validity of the will; to which the appellant replied, affirming their allegations, and joining issue upon the facts, and praying the Orphans' Court to decide the same; whereupon, the Court proceeded to take the depositions of the witnesses; and thereupon sustained the will, and admitted it to probate; from which sentence the *caveators* appealed to this Court.

Mr. W. L. Brent, for the appellants, cited the testamentary law of Maryland of 1798, c. 101, ch. 1, § 3; the book called "Principles of the Roman Catholic Religion," pp. 43, 44, 184; Dorsey's Testamentary Law, 45, note, and p. 142; *Davis v. Calvert*, 5 Gill & Johns. 269; *Huguenin v. Basely*, 14 Ves. 287, 288; *Hale v. Hills*, 8 Conn. Rep. 39; 6 Wheeler, 526, 527; *Norton v. Renny*, 2 Eden, Rep. 286; *Ridgeway v. Darwin*, 8 Ves. 66, 67, 68; *Ex parte Cranmer*, 12 Ves. 450, 451, 452; *James Barker's case*, 2 Johns. Ch. Rep. 232; *Mary Morris's Will*, 3 Mad. R. 192; 2 Bl. Com. 497, Chitty's note; 3 Stark. Ev. 1702, note 1 & 708; Swinburne, part II. § V.; *Clark v. Fisher*, 1 Paige, 171; 2 Harrison's Dig. p. 587; the book called "True Piety," 179, 181, § 12; 182, § 6; § 8, p. 184, Art. 5; 186, § 10.

Mr. Bradley, *contra*, cited *Harrison's case*, 2 Fillemore, 5 Eccl. Rep. 291, 292, 294, 320, 326, 329, 340; *Hester Morris's Will*, 5 Eccl. Rep. 211, 223; *Sinickson's Will*, 3 Wash. C. C. Rep. 580, 585, 588; *Stevens v. Vancleve*, 4 Wash. C. C. Rep. 262, 267; also a Sermon, by ——— in London, that the priests have no power to relieve from purgatory; Prin. Rom. Cath. Religion, 284, Art. 5; 184, Art. 2, 5; Dorsey on Test. Law, 46; *Crampton's case*.

CRANCH, C. J., delivered the opinion of the Court.

1. Upon the first point, the soundness of mind of the testatrix ; the opinions of the witnesses differed very much, according to the side on which they were produced. But there is nothing strange in this. In forming opinions, the mind is insensibly biased by its passions and prejudices, its interests and its associations. The influence of the interest of a friend, or of the society of which the witness is a member, are almost as strong as original self-interest ; and it is more insidious, because we are not so careful to guard against it, inasmuch as it bears the semblance of a virtue. An opinion, also, has less weight than a fact, as it can seldom be the subject of a prosecution for perjury. In forming an ultimate opinion, therefore, upon the question of soundness of mind of the testatrix, the Court must look rather to the facts upon which the various opinions of the witnesses are formed, than to the opinions themselves. The fact that the witness formed the opinion from the facts stated, is itself a fact proper for the consideration of the Court, as evincing the sincerity of the opinion ; but the Court must form its opinion from the whole evidence, consisting of facts and opinions.

The testimony is voluminous, and more contradictory as to opinions than as to facts.

It appears from the evidence, that the testatrix was old, and singular in her manners and dress ; penurious and miserly ; and a religious devotee of the Roman Catholic Church ; that she had always managed her own affairs, and particularly her money matters herself, with much worldly prudence ; lending her money and receiving the interest with great punctuality, until three or four days before making her will, when she gave a power of attorney to Mr. Carbery to transact her business, and afterwards appointed him her executor. That she was eighty-seven years old, and her mind, perhaps, in some degree enfeebled by age, and by her disease, which was dropsy in the chest ; a disease not directly affecting the intellect. That she had, ten years before, made a will containing a similar disposition of her estate, and bequeathing the residue to charitable purposes, after the payment of small legacies to her relatives, and to certain priests. That she had made an intermediate will, in which Mr. Clarke was named executor, and by which she gave similar small legacies to her relatives and to the priests, but omitted to dispose of the residue, which was the principal part of her estate. It was this will which she desired to alter, and which she revoked by the present will.

The principal facts relied upon to prove her insanity are ; first, that she was very old ; second, had many peculiarities, and was very singular in her manners and appearance ; third, that her mind seemed to dwell upon her riches, and money affairs, and

she often spoke of them ; fourth, that she was a woman of strong passions and prejudices ; fifth, that she changed her mind often in respect to her will ; sixth, that she was penurious, and refused to buy medicine for a colored child, whose mother she had hired out ; seventh, that she was very suspicious of her servants, and some of her relatives ; eighth, that she did not take her medicine regularly, sometimes taking it too often, sometimes not often enough, and sometimes not at all ; ninth, that she was quarrelsome about trifles ; tenth, that she often denied herself the necessities of life, and wore very mean and sordid clothes, (although she had property enough,) and said she was afraid she would come to want ; eleventh, that she did not buy sufficient provisions for her servants ; twelfth, that she said that in the preceding summer, she buried eight hundred or one thousand dollars of bank-notes in the earth, which got so wet that "it took two or three days to spread it over her bed and dry it."

The testimony, on both sides, clearly shows that the testatrix was extremely penurious and miserly ; that her ruling passion was the acquisition of wealth ; and it is very apparent that the peculiarities in her manners, appearance, and dress, her denial of the necessities of life for herself and her servants ; her suspicious and quarrelsome disposition, may all be traced to that source, and are evidence of that ruling passion only ; not of mental insanity.

The story of her having buried bank-notes in the earth, if true, may, perhaps, be accounted for by the same ruling passion ; but the absurdity of the act which would make it evidence of insanity, discredits the fact itself. It is not probable that she did the act ; or, if she did, it might have been upon some sudden alarm, or fear, and as a temporary expedient. The witness, who relates her conversation upon that subject, does not state what reason she gave, if any, for an act of such apparent folly. The fact is not corroborated by any other evidence ; and the fact stated as part of the story, that "it took two or three days to spread it over her bed and dry it," seems quite as improbable as the fact of burying it in the garden.

The fact that she altered her will several times, is not, of itself, evidence of insanity ; on the contrary, the consistency of the several wills with each other, as to the general plan of disposition of her property, shows that the subject occupied much of her thoughts for many years, and that her mind was in a sound, disposing state. The will next preceding the last was imperfect, and would have left her intestate as to the bulk of her estate. That she wished to change it, is, therefore, no evidence of intellectual insanity.

But it is said that she was a woman of strong passions and prejudices, and, therefore, she was not competent to make a valid disposition of her estate. It is true that our passions and prejudices are apt to warp our judgment; but they enter into our daily transactions, more or less, and mingle with our motives; and it is impossible to draw the line beyond which they produce mental insanity. The existence of such passions and prejudices is not, of itself, evidence of such insanity.

These observations, we think, apply to all the facts which the witnesses against the will have adduced as the foundation of their opinions; and, without resorting to the opposite testimony, we think the facts not sufficient to justify the opinion expressed. They do not, in our judgment, show a *prima facie* case of testamentary incapacity; but, if they did, they are greatly outweighed by the facts stated by the witnesses in favor of the will, showing that she had, ten years before, made a will containing a similar disposition of the principal part of her estate; that she had continued to manage her affairs with prudence and great economy; that she had lent out her money, demanded and received the interest with punctuality; taken the securities; hired out her own servants, and received their wages; and provided for the wants of her family; and that in these transactions she evinced great acuteness of mind; that this state of mind continued quite up to the 17th of December, the date of the will; and that when she executed it she declared, in the presence of the subscribing witnesses, that she had read every word of it, and that it was just as she wished.

If the case were to be decided by the opinions of the witnesses, we think those in favor of the will greatly preponderate; without considering that of Mr. Lucas, of whose legal competency we doubt, notwithstanding the instrument of writing executed by him as a renunciation or release of his interest under the will.

We are, therefore, of opinion, that at the time of making this will, the testatrix was of sound and disposing mind, and capable of executing a valid deed or contract.

2. The second objection to the will is, that it was made by the testatrix under undue influence operating upon her mind; and under mental delusion.

There is no evidence in this cause, of any influence whatever, exercised over the testatrix, by any person, in relation to this will, other than the influence of the general doctrines of the church of which she was a member, as they were inculcated by the priests.

It was contended that the testatrix bequeathed the greater part of her estate to the church, and the orphan asylum connected

with the church, under a belief that by thus giving her property she would be entitled to the prayers of the church, which would relieve her from the pains of purgatory. That this was not an article of faith of the church, but a doctrine inculcated by the priests, and founded upon the following clause of the prayers for the church, (in p. 44 of the book called "True Piety"): "Finally, we pray thee, O Lord of mercy, to remember the souls of thy servants departed, who are gone before us, with the sign of faith, and repose in the sleep of peace; the souls of our parents, relations, and friends; of those, who, when living, were members of this congregation; and particularly of such as are lately deceased; of all benefactors, who, by their donations, or legacies to this church, witnessed their zeal for the decency of divine worship, and proved their claim to our grateful and charitable remembrance." That this "grateful and charitable remembrance," as explained by the priests, consists of prayers and masses of the church for the repose of the souls of the departed; and that these prayers and masses will relieve or mitigate the pains of purgatory. That it is true, as stated in the book above quoted, (in p. 185, § 5,) "that Catholics" of the Roman Church, "hold that such souls, so detained in purgatory, being the living members of Jesus Christ, are relieved by the prayers and suffrages of their fellow members here on earth; but where this place is, or of what nature or quality the pains are, how long souls may be there detained, in what manner the suffrages, made in their behalf, are applied; whether by satisfaction, or intercession, &c., are questions which do not appertain to faith." That it is no article of faith, that indulgences can be purchased; nor that the prayers of the church will relieve a soul from purgatory; and that she was, therefore, under a delusion.

There is no evidence that the priests taught the testatrix any other doctrine, upon this subject, than that which is stated in the book above cited, as the general doctrine of the church.

Whether that doctrine be true or false, this Court has no jurisdiction to decide. If it was a delusion, it was a delusion common to all the members of that Church, and would equally avoid the will of every Roman Catholic who should bequeathe, or had bequeathed, a legacy for masses for the repose of his soul.

This Court, therefore, cannot say that the will was made under undue influence or delusion.

The third ground of *caveat*, stated in the record, is, that the bequests and devises, in the will mentioned, or many of them, cannot be carried into effect, and are null and void.

This objection involved questions, of which the Orphans' Court had no jurisdiction, and which this Court cannot decide, upon this

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appeal, which is only as to the validity of the will as an instrument.

The sentence of the Orphans' Court, that the will be admitted to probate, is affirmed with costs ; THRUSTON, J., absent.

NEWTON *et al.*, next of kin and Heirs of Eloysa Mattingly, *v.*
LEWIS CARBERY, Executor of Eloysa Mattingly.

A legacy to, or for the use or support, of a minister of the gospel as such; or to, or for the use or support of a religious sect, order, or denomination, is void, by the Bill of Rights of Maryland.

A devise to go in aid of a new Catholic church, then building in Georgetown, is void for uncertainty, as well as by the bill of rights.

A charter granted to certain persons therein named, is to be presumed, *primâ facie*, to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.

THIS was a bill in equity to set aside certain legacies in the will of Mrs. Mattingly, and for a distribution thereof among her next of kin.

The defendant demurred to the bill as to all the legacies therein sought to be vacated, except the legacy of one half of the residue to "the Georgetown Free School and Orphan Asylum;" as to which he answered, affirming the existence of the school as a corporate body.

This demurrer and answer were admitted to be filed for the purpose of taking the opinion of the Court, as to the validity of the legacies to the priests, &c., with leave to amend the bill and answer, &c.

The testatrix, after bequeathing sundry small legacies to her next of kin and heirs at law, says:

1. I will that my executor pay to the Rev. William McSherry, President of Georgetown College, one hundred dollars, to be distributed equally among the clergy of the said college, for the purpose of having masses offered up for the repose of my soul.

2. I will that my sideboard be given to the Rev. Mr. Lucas, pastor of Trinity Church, for the use of said church.

3. I will to the pastor of the Catholic Church at Newton, in St. Mary's county, ten dollars; one half to go to the poor of that congregation, and the other for masses for me.

4. I will that my executor pay to the Archbishop of Baltimore, ten dollars.

5. To Bishop Benjamin Fenwick, of Boston, ten dollars.

6. To the two pastors of Trinity Church, of this place, ten dollars each.

7. To the Rev. S. L. Dubuisson, ten dollars.

8. To the Rev. William Matthews, ten dollars.

9. To the Rev. Mr. Donelson, of the city of Washington, ten dollars, to go in aid of the new Catholic church, now building in said city.

10. To the Rev. John McElroy, ten dollars.

11. To the Rev. Mr. Detheux, of Missouri, ten dollars.

12. To the Rev. Joseph Carbery, of St. Mary's county, ten dollars.

13. To the Rev. Mr. Mudd, ten dollars.

14. To the Rev. Mr. N. Coombs, ten dollars.

15. To the Sisters of Visitation of Georgetown, District of Columbia, ten dollars.

16. To the Carmelite Nuns of Baltimore, ten dollars.

17. To the Catholic Bishop of Ohio, ten dollars.

18. To the convent of Dominicans, in Bardstown, Kentucky, ten dollars.

19. To the pastors of Trinity Church, in this place, for the use of the poor of that congregation, ten dollars.

20. To the Sisters of Charity, of St. Vincent's Asylum, in Washington city, ten dollars.

21. To the pastor of St. Joseph's church, St. Mary's county, twenty dollars; one half for the poor of that congregation, and the other half for the use of that church.

22. To the pastor of St. Aloysius' Church, of said county, twenty dollars; one half for the use of the poor of that congregation, the other half for the use of that church.

23. I will to the pastor of St. Joseph's Church aforesaid, and to his successors, the vestments, chalice, and mass-book, which I own in that county, for the use of that church.

24. I will and bequeathe that my negro woman Matilda Gordon, and her child Mary Ann Elizabeth, shall be free at my death.

25. And finally, I will and bequeathe, that after all the aforementioned legacies and bequests shall have been paid, and all necessary expenses in settling up my estate, including commission and all other legal charges, the remainder of my estate shall be applied as follows, to the two following objects, to wit: one half of said remaining part, to go in aid of the erection of a new Catholic church in Georgetown; the amount for that object to be put out at interest, or laid out in some safe stock bearing interest, as my executor shall think best, until said church shall have been begun; the other half to go as an endowment, in aid of the Georgetown Free School and Orphan Asylum, heretofore kept near Trinity Church,

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which, for want of funds, has, for a time past, laid in a state of inactivity. It is my desire, that the said school, having a charter conferring many benefits and rights, as it has, shall be continued and encouraged, and that its influence and effects in doing good by the educating of poor children, and doing all other things as was intended by its charter, should be done, shall be placed upon a permanent footing, and be a blessing, as it should be, to the children admitted into it, a comfort to their parents, and an honor ; and a means of sanctifying grace to those who may conduct it.

It is my desire and will that the house and lot I now occupy may be either sold or kept, as my executor may think best, as it will fall, probably, within the distribution to be applied to the last two objects named in my will ; namely, the building a new church in Georgetown, and the Georgetown Free School and Orphan Asylum.

The cause was argued by *Mr. W. L. Brent* and *Mr. Marbury*, for the plaintiffs, and by *Mr. Bradley*, for the defendant.

The counsel for the plaintiffs cited the Bill of Rights of Maryland, § 34 ; the Act of Congress of March 2, 1833, incorporating "the Georgetown Free School and Orphan Asylum ;" *Dashield v. Attorney-General*, 5 H. & J. 392 ; and *Durgee v. Barnes*, in this Court, at December term, 1827.

The counsel for the defendant cited 1 Kent, 286, 312.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., dissenting.)

By the "Declaration of Rights," prefixed to the Constitution of Maryland, and which was a part of the laws of that State on the 27th of February, 1801, when they were adopted and continued in force in this county, by the Act of Congress of that date, it is declared in section thirty-four :

"That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such ; or to any religious sect, order, or denomination ; or to, or for the support, use, or benefit of, or in trust for, any minister, public teacher, or preacher of the gospel, as such ; or any religious sect, order, or denomination ; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use, or benefit ; and also every devise of goods or chattels to or for the support, use, or benefit of any minister, public teacher, or preacher of the gospel, as such ; or any religious sect, order, or denomination, without the leave of the legislature, shall be void ; except always any sale, gift, lease, or devise, of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-

ground, which shall be improved, enjoyed, or used only for such purpose ; or such sale, gift, lease, or devise, shall be void."

Under this Declaration of Rights, it is admitted, in argument, that the legacies numbered 2, 3, 4, 6, 9, 17, 19, 21, 22, and 23, are void, as being made either to some minister of the gospel, as such, or to, or for the use or benefit of some religious sect, order, or denomination, without the leave of the legislature. The legislature, however, is presumed to give leave to the donor to make the gift, when it permits the donee to accept and hold it.

The Sisters of the Visitation of Georgetown, and the Sisters of Charity of St. Vincent's Asylum, in Washington, it is understood, have been incorporated, with powers to take and hold property by devise or bequest. The legacies, therefore, Nos. 15 and 20, are not within the prohibition of the Declaration of Rights.

We have no evidence that the Carmelite Nuns of Baltimore, or the Convent of Dominicans in Bardstown, in Kentucky, have been incorporated with like powers. The legacies, therefore, Nos. 16 and 18, must be considered as within that prohibition, and, therefore, void.

The legacies Nos. 5, 7, 8, 10, 11, 12, 13, and 14, being bequeathed to the several legatees personally by name, and not to them as ministers, are not within the prohibition of the Declaration of Rights, and are valid. One of the remaining disputed legacies is No. 1, of one hundred dollars to the Rev. William McSherry, President of Georgetown College, to be distributed equally among the clergy of said college, for the purpose of having masses offered up for the repose of the soul of the testatrix. This is substantially a bequest to "the clergymen of the college," not by name, but as clergymen ; for it was only in that character that they could offer up the sacrifice upon the altar, which the mass is supposed to be.

Another of the remaining disputed legacies is, of one half of the residue of the estate "to go in aid of a new Catholic church in Georgetown."

This legacy is disputed upon two grounds : 1. Because it is prohibited by the Declaration of Rights ; and 2. Because it is uncertain who is to claim it.

We think it void upon one of those grounds, if not upon both. It was intended for the use of a religious sect, order, or denomination ; and if the legatee were sufficiently described, it would still be void under the Declaration of Rights. But the legatee is not sufficiently certain, and therefore, also, it is void.

The remaining disputed legacy is, that the other half of the residue of the estate is "to go as an endowment in aid of the Georgetown Free School and Orphan Asylum," which was incor

porated by the Act of Congress of the 2d of March, 1833, c. 87, [6 Stat. at Large, 538,] whereby the corporation is authorized to purchase, take, and receive, any lands, or other property, which should thereafter be given, granted, sold, bequeathed, or devised to them, within a certain limit. The corporation was to consist of the persons named in the charter and their successors in office; and vacancies were to be filled from time to time, "according to the mode to be described in the by-laws," which by-laws were to be made by the corporation. They were authorized to appoint and remove all necessary officers, and to prescribe their duties, and regulate their compensation.

The annual contributors were to meet in June in every year, and elect nine female managers, whose duties were to be regulated by the by-laws which were to be made by the corporation; but the meetings of the contributors, and the election of the female board of managers, were not necessary to the existence of the corporation, which was to consist of the board of trustees alone.

It is, however, contended that the corporation never existed, because the charter never was accepted.

It is admitted, in argument, that the persons named in the charter were previously trustees of a school in Georgetown, called "The Georgetown Free School." The presumption, from that fact, is, that the charter was granted at their instance; and the presumption, also, is, that a charter is accepted by those who have applied for it, unless, from the terms of the charter itself, it appears, that some act of acceptance is to be done, to give validity or perfection to the act of incorporation. By the present charter no such act was required. The burden of proof, therefore, rests upon the plaintiffs to rebut these presumptions.

In order to do this, they show the minute-book of the proceedings of the board of trustees of the old school, (which existed before the date of the charter,) continued on for four years after that date, that is, until 1837, when their meetings were discontinued.

In the minutes of those proceedings, nothing is said of the charter, nor of the asylum, nor of any meeting of the contributors, nor of an election of a board of female managers, nor of any by-law regulating the duties of that board of managers; or prescribing the mode of filling vacancies in the board of trustees. Seven years have elapsed since the date of the charter, and nothing appears to have been done to organize the school and asylum under the act of incorporation.

These circumstances seem to us sufficient to rebut the *primâ facie* presumption of acceptance, and we must say, that there is not sufficient evidence that the charter was ever accepted, and conse-

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quently, that the corporation does not exist, and did not at the death of the testatrix. We think, therefore, that this residuary bequest is also void.

The consequence of this opinion, if correct, will be, that these void legacies will fall into the intestate *residuum*, to be distributed among the next of kin, according to the statute of distribution.

MORSELL, J., concurred.

THRUSTON, J., dissented, and delivered an oral opinion.



JAMES ROACH, Administrator of Philip Roach, v. W. HULINGS *et al.*

A bill in equity, filed without being signed by the plaintiff or his counsel, will be ordered to be taken off the files, because it cannot be received under the 16th rule of this Court.

When taken off, it may be signed by counsel, and be made the ground of a motion for a new injunction.

If a judgment at law has been obtained by surprise, or without the knowledge of the defendant or his counsel, in a case in which the defendant had taken a bill of exceptions, and intended to prosecute a writ of error to the Supreme Court of the United States, and to obtain a *supersedeas*, this Court will, upon a proper appeal-bond, and injunction-bond, being given, stay the execution, by injunction.

BILL IN EQUITY to stay execution on a judgment at law, obtained, it was said, by surprise, in a case where the judgment was rendered without the actual knowledge of the defendant, or his counsel, in a case in which the defendant had taken a bill of exceptions, and intended to prosecute a writ of error to the Supreme Court of the United States; and to obtain a *supersedeas*, after the expiration of the ten days allowed by law.

The bill states that the defendant Hulings obtained a judgment at law against the complainant, as administrator of Philip Roach, and that, at the trial, the now complainant took bills of exception to certain opinions of the Court, with intent to prosecute a writ of error, and to supersede the judgment when it should be finally rendered. That after the verdict for the plaintiff at law, the cause was referred to an auditor, to ascertain the proportion of assets to which the plaintiff was entitled, under the testamentary law of Maryland, who reported, and to whose report, the then defendant filed certain exceptions, some of which he understood, were allowed by the Court, and he supposed the cause would be remanded to the auditor; but judgment was entered by the clerk; of which judgment, neither this complainant, nor his counsel, had any information, until more than ten days after its rendition, and after the end of the term; so that he lost his legal right to supersede that judgment. That the plaintiff at law resides in Penn-

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sylvania, and is insolvent, as the complainant believes, so that if he should satisfy the judgment, and it should be reversed, he would be unable to recover the money. It, therefore, prays that upon filing an approved appeal-bond, and injunction-bond, the execution upon the judgment at law, may be staid by injunction, until the further order of the Court.

This bill, although sworn to by the complainant, was not signed by him or his counsel. Upon application to CRANCH, C. J., in vacation, he ordered the injunction on the 10th of March, 1840, without noticing the want of signature.

Mr. Bradley, and *Mr. Smith*, now moved the Court to order the bill to be taken off the files, because it was not signed by the complainant, according to the 16th rule of this Court, which is in these words: "16. Ordered, that every bill, petition, or answer, in equity; and every other petition presented by an attorney or solicitor, in this Court; be signed by such attorney or solicitor before it shall be received." 2 Mad. Ch. Pr. 167; *French v. Dear*, 5 Ves. 547.

Mr. R. J. Brent, *contra*, for complainant.

Under the 5th Rule of the Chancery Practice, the complainant has a right to amend his bill. It is a bill, although not signed, and may be amended.

The 16th Rule of Practice of this Court requires the bill to be signed by counsel, in all cases. This rule is repugnant to the 35th section of the Judiciary Act of 1789, which enacts, "that, in all the courts of the United States, the parties may plead and manage their own causes personally," but this rule requires them in all cases to employ counsel. By the 17th section, the Court can make no rule repugnant to the laws of the United States, and by the 32d section, the Court "may at any time permit either of the parties to amend any defect in the process or pleadings," and no judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be reversed "for any defect or want of form."

The COURT, (THRUSTON, J., absent,) ordered the bill to be taken from the files, because it could not be received under the 16th Rule of this Court, it not being signed, either by the complainant or his solicitor.

The bill being taken off the files, and signed by counsel, *Mr. R. J. Brent* presented it again to the Court, and moved the Court to reinstate the injunction, and contended, indeed, that the amendment did not dissolve the injunction which had been granted by the judge, in vacation. *Read v. Consequa*, 4 Wash. C. C. Rep. 174.

The COURT said they would receive it now as a motion for an injunction *de novo*.

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Mr. R. J. Brent, contended for three grounds of injunction, namely, accident, by which the complainant lost his legal right to supersede the judgment; the non-residence of the defendant; and his supposed insolvency; and cited, 1 Mad. Ch. Pr. 50; Barbour & Harrington, p. 26, § 1; *Hodgson v. Marine Ins. Co.* 7 Cranch, 332; 2 Eq. Dig. 63, 64, § 29, 451, 471, § 53; *Crawford v. McDonald*, 2 Hen. & Mun. 191.

Mr. Bradley and *Mr. Smith*, *contrà*, cited 2 Eq. Dig. 65, § 43; 3 Eq. Dig. 468, § 30; *Dodge v. Strong*, 2 Johns. Ch. Rep. 230; 2 Story, Eq. 180, 181, 182.

The case was argued again by *Mr. Brent*, for the complainant, and by *Mr. Bradley*, for the defendant.

The COURT made the following order: "The within bill having been filed, together with an approved injunction-bond, and also an approved appeal-bond, conditioned to prosecute with effect the complainant's writ of error in the within bill mentioned. It is ordered by the Court, that the injunction shall issue as prayed."

WILLIAM M. WALKER *et al.* v. DANIEL PARKER *et al.*

In suits in equity, in the Circuit Court in the District of Columbia, depositions taken under the Act of Congress of 1789, cannot be read in evidence.

A letter directed to the agent of the opposite party at Chillicothe, and put into the post-office at Cincinnati on the 21st, informing him that the deposition of a certain witness would be taken at Cincinnati on the 28th of the same month, is not conclusive evidence of notice, if, in fact, the letter was not received until the 29th.

If, upon the return of depositions, the opposite party except "to the caption as well as to the substance of them," he may, at the hearing, even after the lapse of several years, specify his objections and insist upon them.

If, upon cross-examination of a witness, in taking his deposition, he appears to be interested, and therefore incompetent, the objection to his competency is not waived by pursuing the cross-examination upon the merits of the case.

Executors, who are parties in the cause, cannot be examined as witnesses, without an order of the Court to examine them; and such an order will not be given, if they are interested in the event of the cause.

BILL IN EQUITY; set for hearing by the defendant, at March term, 1839.

Certain depositions had been taken by the complainant under the 30th section of the Judiciary Act of September, 1789, [1 Stat. at Large, 73.] Upon the opening of which in Court,

Mr. Jones, the counsel for the defendant Parker, made this memorandum upon the envelop, and filed the same with the depositions, to wit: "Note. Defendant Parker excepts to the caption as well as the substance of the depositions taken on the part of complainants, to wit: Longworth, Piatt, &c. &c."

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Mr. Jones now objected to the depositions, because they were not taken absolutely under a commission from this Court, but were taken *de bene esse* under the Act of Congress of 1789, [1 Stat. at Large, 73.] The uniform practice of this Court from its commencement, and of the Court of Chancery in Maryland long before that time, has been to take the evidence in causes in equity under a commission issued by the Court; and never to examine witnesses *vivâ voce* in open Court, unless to prove exhibits. A deposition *de bene esse*, under the Act of Congress, cannot be read at the hearing, if the witness can be had; and if he should be present, this Court would not examine him *vivâ voce*; so that his testimony would be lost.

Mr. R. S. Coxe, contra. The Judiciary Act of 1789, § 30, [1 Stat. at Large, 73,] expressly requires "that the mode of proof by oral testimony and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law." And by the 25th Rule of Practice prescribed by the Supreme Court to the Circuit Courts of the United States, "Testimony may be taken according to the Acts of Congress, or under a commission."

Mr. Jones, in reply. The 30th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] has also this proviso: "That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus protestatem* to take depositions according to common usage, when it may be necessary to prevent a failure, or delay of justice; which power they shall severally possess."

By the second section of the Act of Congress of the 8th of May, 1792, [1 Stat. at Large, 275,] "for regulating processes," &c., it is enacted that the forms and modes of proceeding in suits "of equity," shall be "according to the principles, rules, and usages which belong to the courts of equity," "as distinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions, as the said courts respectively shall, in their discretion, deem expedient; or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." And by the 25th section of the Act of 29th of April, 1802, [2 Stat. at Large, 156,] "To amend the judicial system of the United States," it is enacted, "that in all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions, which depositions shall be taken in conformity to the regulations prescribed by

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law for the courts of the highest jurisdiction in equity, in cases of a similar nature, in that State in which the Court of the United States may be holden."

By the Judiciary Act of 1789, § 17, [1 Stat. at Large, 73,] all the courts of the United States have power "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the law of the United States."

The COURT (*nem. con.*) was of opinion, that the depositions taken under the Act of Congress, cannot be read in evidence at the hearing; and observed that the uniform practice of this Court, in cases of equity, has been to take the testimony by deposition under a commission. A deposition taken under the Act of Congress is only *de bene esse*, and cannot be used, if the witness is here; and if here, his testimony cannot, according to the practice of this Court, be taken *vivâ voce* in open Court.

Mr. Jones then objected to the depositions of ———, taken in Cincinnati on the 28th of November, 1827, under a commission to J. G. Burnet and William Burke; for want of notice to Mr. Scott, the defendant's counsel.

A written notice, signed by the commissioners, that the depositions of sundry persons would be taken by them at the Mayor's office in Cincinnati, on the 28th of November, 1827, was put into the post-office in Cincinnati on the 21st, addressed to Mr. Scott at Chillicothe, but was not received by him until the 29th. The mail of the 21st, by its usual course reached Chillicothe on the evening of the 22d or 23d.

Mr. Key and Mr. Cox, for the complainant, contended that this was notice; that it would be good notice to charge an indorsee, and *à fortiori* it is sufficient notice of taking a deposition.

Mr. Jones, in reply. That is a rule that applies to mercantile cases only, and depends upon commercial usages and principles, and the presumed assent of the party to receive notice in that way.

The COURT, (MORSELL, J., *contrâ*,) was of opinion that it was not notice.

CRANCH, C. J., said it could be only presumptive evidence of notice, and that presumption is destroyed by the fact that the notice was not received until after the depositions were taken.

MORSELL, J., thought that the party had done all that was reasonable, all that he was bound to do; and Mr. Scott ought to have been there to receive the letter in time.

THRUSTON, J., said it was not a case to which the law-merchant applies, and therefore common-law notice was necessary.

Mr. Key and Mr. Cox, for the complainant, objected to Mr. Jones now, after the lapse of several years, taking particular

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exceptions to the depositions, not specified at the time the depositions were returned and opened.

The Court, however, overruled the objection, and suffered *Mr. Jones* now to specify and insist upon his particular objections to the depositions. See *Gresley's Equity Evidence*, 155, Philadelphia Edition, 1837; *Raymond's Digested Chancery Cases*, 79.

Mr. Jones then objected to the depositions of Benjamin M. Piatt and Nicholas Longworth, that they were parties in the cause, and there was no order of the court to take their depositions; and that they were also parties in interest. That Longworth's deposition was never finished, on account of his ill health.

Mr. Key, contra. Longworth's deposition is complete; it does not appear that any interrogatories are not answered, or that either of the parties wished to put others.

As to the objection of interest, they are merely executors without any personal interest, and are mere nominal parties. The contest is between two contending assignees of John H. Piatt.

The defendant has waived the objection of interest by requiring these witnesses to be cross-examined upon the merits after the interest, if any, was disclosed, and no objection then made to their competency. The objection should have been taken at the time of the examination. *United States v. One case of Hair Pencils*, 1 Payne, 400; *Gresley on Equity Evidence*, 207.

Mr. Jones, in reply. There is a difference between an examination in open court, and before commissioners. If it be in open court, the moment the interest is discovered upon cross-examination, the court decides that the witness is incompetent, and his testimony is at once excluded. But upon an examination before commissioners, *non constat* that the court will reject the witness; the objection may be overruled, so that if the party should be precluded from further cross-examination before the commissioners, he would lose the benefit of cross-examining the witness. The cross-examination, therefore, ought to proceed *de bene esse*, to avail the party, in case his objection should be overruled; and to be rejected if the objection should prevail. A party can be examined as a witness, only under an order of the Court, and then only upon collateral matters.

THE COURT, (MORSELL, J., *contra*,) was of opinion, that the defendants, the executors of John H. Piatt, were not competent witnesses, without an order of the Court to examine them; and that they were interested, and therefore the Court would not order their depositions to be taken.

That the cross-examination of Piatt was not a waiver of the objection on account of his interest, although the cross-examination was continued after his interest was disclosed; the objection

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to the competency of the witness having been expressly saved by the agreement for the cross-examination.

By consent, the order for setting the cause for hearing was set aside, and new commissions issued for taking the testimony of the witnesses.

CHESAPEAKE AND OHIO CANAL COMPANY v. LEWIS JOHNSON,
Administrator of William Otis.

The Orphans' Court has no power to annex conditions to the payment of the dividend of a judgment at law recovered against the intestate for instalments due upon the stock of the Chesapeake and Ohio Canal Company.

THE Chesapeake and Ohio Canal Company had recovered judgment against the intestate in his lifetime upon motion and ten days' notice, for \$2,500 for instalments upon 50 shares of the stock in that company, under the 5th section of the charter. After his death, the Orphans' Court for Washington County, on the 2d of August, 1839, ordered, "That the administrator of William Otis make a dividend among the judgment creditors of said Otis, of thirty-six and an half per cent., on their respective claims." And on the 21st of November, 1839, "at a special court held this day, at the request of Lewis Johnson, the administrator of William Otis, the Court passed the following order: Ordered, that the administrator of William Otis pay to the Chesapeake and Ohio Canal Company, the amount of their dividend of said estate, provided he receive from them a certificate of the stock of said company, equal to the whole amount paid in."

From this order the Canal Company appealed to this Court.

Messrs. Brent & Brent, for the appellants, contended that the effect of this order would be to compel them to issue full certificates of stock to the amount of the dividend, at \$100 a share, which they were not bound to do. They had a right to apply the payment equally to all the shares subscribed for, or owned by the intestate.

Mr. Morfit, contrà. There was not judgment at law. The Court had no jurisdiction to render judgment on motion. The judgment was by default for breach of contract. There should have been a writ of inquiry of damages. The defendant had a right to apply the payment to particular shares, and thus obtain certificates in full.

The Court reversed the order of the Orphans' Court, with costs.

ELEXIUS SIMMS v. ELIZABETH SCOTT AND SUSAN ANN STRETCH.

A *feme covert*, having a separate estate in the hands of her trustee, may contract debts and bind her separate estate for the payment; and the Court will appoint a receiver to collect the rents and profits.

BILL IN EQUITY, to charge the separate estate of a *feme covert*.

The defendant, Elizabeth Scott, was the wife of Alexander Scott, who was insolvent, and possessed no estate or property of any kind. A separate estate, however, had been vested in her daughter, the defendant, Susan Ann Stretch, "in trust, that Elizabeth Scott, wife of Alexander Scott, of the city of Washington, shall have, use, occupy, possess, enjoy, and receive, after the taxes and necessary repairs of said property shall have been paid, the rents, issues, and profits thereof, for and during her natural life, to and for her own separate and sole use, notwithstanding her coverture, and without being in anywise subject to the debts or control of her said husband, Alexander Scott, or any other with whom she may intermarry; and her separate receipt shall be, and be taken as, a full discharge for any sum or sums of money which shall or may become due and payable to her out of the said lands and premises; and she may appoint, in like manner, by her separate writing under seal, any other person or persons to receive the same for her as though she were sole; and, after the death of the said Elizabeth Scott, then to such person or persons as she shall or may, by writing, under her hand and seal, or by her last will and testament, direct and appoint; and in default of such appointment, to the right heirs of the said Elizabeth."

The bill states that the complainant, entirely upon the credit of her separate estate, supplied her from time to time with groceries for the use of her family, to the amount of \$180; when, on the 10th of January, 1837, she, and her said trustee, executed the following paper, addressed to Dr. Causin:

"\$180. Washington City, January 10, 1837. Sir,—You will please pay to Mr. Elexius Simms, or his order, the sum of one hundred and eighty dollars, in the event of the claim of the heirs of the late Col. Jonathan H. Stone's bill passing this session, on which there was a bill reported at the last session of Congress; or, should it not pass, we hold ourselves bound for the above amount to the said Elexius Simms.

ELIZABETH SCOTT,

SUSAN ANN STRETCH,

Trustee for Elizabeth Scott."

"Should the claim alluded to above, pass, I will pay the above amount of one hundred and eighty dollars, as soon as the money is received by me.

NATHANIEL P. CAUSIN.

January 11, 1837."

That the claim aforesaid never did pass ; that the said Alexander Scott never was bound for the debt ; and that the complainant's only remedy is against Mrs. Scott and her separate estate ; and he prays for an account of that estate, and payment of his claim, &c.

The answer of the defendant, Elizabeth, admits all the material facts, but says that she continued to live with the said Alexander Scott until his death, and that the articles furnished were for the use of his family, which he was bound to support ; and that they were obtained with his knowledge and approbation ; she admits that she had the sole and absolute disposition of her separate personal property, but that she had only a life estate in the real.

The cause was set for hearing on the bill, answer, general replication, and depositions.

Mr. C. Cox, for the complainant. An absolute power of selling includes the lesser power of mortgaging or pledging. An equitable disposition of the property will be supported in a court of equity, although it may not be in the form required by the trust. The order of the 10th of January, 1837, is a charge upon the estate. *Price et al. v. Bingham*, 7 Har. & Johns. 296 ; *Jaques v. The Methodist Episcopal Church*, 17 Johns. R. 548.

A court of equity will regard a *feme covert* as a *feme sole*, so far as regards her separate property, and will hold it bound by her bond or note, although void by her legal incapacity thus to bind herself, and although there be no express charge of the debt upon her property. *Price v. Bingham*, 7 Har. & Johns. 296 ; *Heatley v. Thomas*, 15 Ves. 596 ; *Bullein v. Clarke*, 17 Id. 365.

Mr. Bradley, *contrà*, contended that Mrs. Scott had no power to bind the estate but according to the form prescribed in the trust. That she had only a life estate in the real property, and could not incur the fee. Clancy on Married Women, c. 5, p. 289, 292, 304, 306 ; *Watson v. Cheshire*, 1 McCord, 241.

The COURT (THRUSTON, J., absent,) decreed that the complainant was entitled to be paid out of the separate estate of Mrs. Scott, in the hands of her trustee ; and that unless the debt should be paid by a certain day, the separate estate should be placed in the hands of a receiver, to collect the rents, &c., and that Alexander Hunter be appointed receiver, who should give bond, &c. &c.

Burch v. Dowling.

FIELDER BURCH v. WILLIAM DOWLING.

Upon a replevin-bond, the plaintiff may recover, although there has been no judgment for a return of the property; but the plaintiff must show that he has sustained damage by the plaintiff in replevin not prosecuting his writ with effect.

DEBT on replevin-bond, for not prosecuting the writ with effect, for not returning the property, and for not paying the costs.

The plaintiff, Burch, was a constable, and had taken certain goods in execution to satisfy a debt due by to . They were replevied by one Isabella Martin, who, with the defendant and another, executed the bond, in the penalty of \$75, for which this suit was brought. Both parties appeared at the return of the writ of replevin, and the defendant having laid a rule on the plaintiff to declare by the rule-day, the cause was continued until the next term, (namely, March term, 1838,) when the plaintiff was *non-pross'd* on the rule, and judgment was rendered against the plaintiff for costs, but no judgment was entered up for a return of the property, nor any avowry or suggestion for a return filed by the defendant. Whereupon, the present suit was brought, and the breaches assigned are, that the plaintiff in replevin did not prosecute her writ with effect, did not return the goods, and did not pay the costs.

Mr. Hoban, for the defendant, contended that the plaintiff could not recover without showing a judgment for a return, and prayed the Court so to instruct the jury; and cited 7 Wheeler, 594; *Moore v. Shield*, December term, 1824, (2 Cranch, C. C. 529.)

Mr. Bradley, for the plaintiff, cited *Smith v. Hazel*, in this Court, November term, 1826, (3 Cranch, C. C. 55); *McDaniel v. Fish*, at December term, 1818, (2 Cranch, C. C. 160); *Dias v. Freeman*, 5 T. R. 195; 7 Wheeler, 569.

The COURT (THRUSTON, J., absent,) refused to instruct the jury as prayed by *Mr. Hoban*.

Mr. Bradley then contended that the plaintiff was entitled to recover the whole amount of the debt mentioned in the execution, whatever might be the value of the goods seized; or that the presumption is that the officer took enough to satisfy the debt, and casts the burden of proof on the defendant to show the contrary. 11 Geo. 2, c. 19.

But the COURT said that the plaintiff must show that he sustained damage by the plaintiff's not prosecuting her replevin with effect; and must show the amount of his damages.

Verdict for the plaintiff, \$43.13.

HARRIET JONES AND LETTY CLARKE v. UNITED STATES.

It is not sufficient, in any case, for a jury to find testimony; they must not only believe the testimony, but must find the facts which the testimony is intended to prove.

The jury ought not to find the defendants guilty unless they find all the facts necessary to constitute the offence charged.

No person is guilty, under the clause of the Penitentiary Act of the District of Columbia, respecting false pretences, unless he has obtained something by his false pretence.

If three are charged with obtaining money by false pretences, and one only receive the money, the others are not guilty under the statute, which punishes those only who obtain the fruit of the fraud.

A person who participates in the fraud, and who obtains the benefit of the money, may well be said to obtain the money.

The judge may refuse to give an instruction not predicated upon a supposed finding of the jury.

If the jury find the false pretences and the subsequent purchase, they may infer that the purchase was made upon the faith of the false pretences.

If three be jointly indicted for obtaining a check by false pretences, and it happen that the check is delivered to one of the three in the absence of the two others, who afterwards participate in the proceeds of the check, they are all equally guilty.

A false assertion, by means of which the party fraudulently obtains money or goods, &c., is a false pretence, within the meaning of the Penitentiary Act.

Congress, in passing that act, had in view the Act of 30 Geo. 2, c. 24, respecting false pretences.

A fraudulent intent is supposed to be a necessary ingredient in the offence of obtaining money, &c., by false pretences, under that act, although the act does not expressly require it.

The defendant's confession that she was free is competent evidence against her of that fact.

ERROR, from the Criminal Court of the District of Columbia for the county of Washington, upon a judgment against the plaintiffs in error, on a joint indictment against them and one William H. Brewster, who was not taken.

The indictment had three counts.

1. The first count stated, "that William H. Brewster, Lucretia Clarke, alias Letty Clarke, free negress, and Harriet Jones, free negress, intending to cheat and defraud one Thomas Williams of his moneys on the 26th of October, 1839, with force and arms, at, &c., did falsely, knowingly, deceitfully, designedly, and unlawfully pretend to him the said Thomas Williams, that the said Lucretia Clarke, then and there appearing with the said William and Harriet, was the slave and property of him the said William H. Brewster; whereas in truth and in fact she was not his slave and property as the said William, Letty, and Harriet then and there well knew; and whereas, in truth and in fact the said Lucretia was not a slave at all, but was a free woman, as they the said William, Letty, and Harriet then and there well knew at the time of the said false pretence; and the said William then and there unlawfully, knowingly, designedly, and falsely sold and

delivered the said Lucretia to the said Thomas as the slave and property of him the said William as aforesaid, with the consent, approbation, and procurement, advice and coöperation of the said Letty and Harriet; and the said Thomas, as payment for the said Lucretia, delivered to the said William, a check in writing, for the payment of \$300 to the said William, on the Patriotic Bank of Washington; being an instrument of writing for the payment of money. And the said William, by the false pretences aforesaid, of him the said William and of the said Letty and Harriet, did then and there unlawfully, knowingly, designedly, and falsely obtain from the said Thomas the said check in writing for the payment of \$300, being an instrument in writing for the payment of \$300, being an instrument of writing for the payment of money, with the intent, then and there by them the said Letty, Harriet, and William had and entertained to cheat and defraud the said Thomas of the same; to the great damage of the said Thomas; against the peace and government of the United States and against the form of the statute in such case made and provided."

2. The second count charged the same false pretence as made to the said Thomas Williams with intent to defraud one William H. Williams, whose agent the said Thomas was, whereby the said Thomas, as agent of W. H. Williams, was induced to give to Brewster a check on the Patriotic Bank for \$300, whereby he obtained the said check by the said false pretences, with intent to defraud the said W. H. Williams.

3. The third count, charged the intent to defraud Thomas Williams of his moneys by the same false pretences, &c., and that he was induced thereby to give, and did give to the said Brewster, twenty bank-notes, amounting to \$300; which he thus obtained, with intent to defraud the said Thomas Williams. These two counts contained averments similar to those in the first count.

At the trial in the Criminal Court, bills of exception were taken to ten instructions given or refused.

Mr. R. J. Brent and *Mr. Hoban*, for the appellants. It appears that Brewster, when he sold Lucretia to Williams, gave a bill of sale with warranty; and when a warranty is taken, the previous representation is not a criminal false pretence. *The King v. Codrington*, 1 Car. & Payne, 661. Williams was not deceived. He gave no credit to the representations; but relied upon his warranty. All the pretences were merged in and covered by the warranty. Brewster did not get the money upon his pretences, other than his warranty, and he is not liable for the pretences of the two other defendants; and they did not obtain any thing by

their pretences; nor does the declaration charge that they did. A person cannot be guilty under that clause of the Penitentiary Act against false pretences, unless he obtains something by his pretence.

A mere false assertion of a fact is not a false pretence within the statute.

There is no evidence that these two defendants were free, except their own admissions. *Primâ facie* they are slaves; and if by the admission of a slave that he is free, he can be condemned to the penitentiary, his owner may entirely lose his service.

The falsity of the pretence must be established by undoubted proof. 2 Russell on Crimes, 112; *Rex v. Sowers*, 1 Russ. & Ry. Criminal Cases, 25; *Rex v. Babcock*, 1 Russ. & Ry. 249; *Rex v. Stuart*, Id. 363; *Rex v. Cherry*, Id. 421, 461. A check is not an instrument for the payment of money; and the indictment does not charge that the check was payable to any person.

In regard to the third count, the bank-notes obtained by the check were not the notes of Williams. They never were in his possession. 2 Russell, 114.

Mr. Key and *Mr. Addison*, *contra*. In *Codrington's case*, it was a covenant for title when the vendor had previously sold his interest to a third person. This was held not to be sufficient to support an indictment for obtaining money upon false pretences. But if there had been any false papers shown, it would have been a false pretence. Here the producing the woman of color, and the possession of Brewster and his assertion of title are clearly false pretences.

The confessions of the appellants that they were free, are competent evidence against them, on this trial; but they would not have been evidence against the claim of the owner; or of any person claiming to be owner. The receipt of the money by one of the three, obtained by the joint false pretences of the three, is the receipt of all.

This is a misdemeanor in which there are no accessories. The cases cited, are of felony, in which there may be accessories, and therefore do not apply.

It was not necessary that Williams should have been in actual possession of the notes. The possession of the bank was his possession. Starkie on Ev., part iv. p. 565; 2 Russell on Cr. 300, 302, 303, 309; *Young et al. v. The King*, 3 T. R. 98; 5 Wheeler, 391.

CRANCH, C. J., after reciting the counts of the indictment, delivered the opinion of the COURT, (THRUSTON, J., absent.)

At the trial of the defendants, Lucretia Clarke and Harriet Jones, (the other defendant, William H. Brewster, not having

been taken) the Judge, at the prayer of the District Attorney of the United States, instructed the jury,

1. "That if the jury believe the testimony in the foregoing statement, and also believe, from the evidence, that the representations of the prisoners to Williams were, in part, the inducement with Williams to buy the woman, then the traversers are guilty," meaning no doubt, guilty upon this indictment.

The statement of testimony referred to, does not appear among the papers submitted to the Court, nor is there any transcript of the record.

We ought not to be called upon to decide cases in error, until the record is fully made up and presented to the Court. But however the statement of the testimony may be, it is not sufficient, in any case, for the jury to find testimony. They must not only believe the testimony to be true, but they must find the facts which the testimony is intended to prove.

The jury ought not to find the defendants guilty, unless they should, from the evidence, find all the facts necessary to constitute the offence charged.

Whatever may have been the statement of the testimony, therefore, we think the instruction was wrong. We think it wrong, also, because the indictment does not charge these defendants with any offence under the Penitentiary Act. No person is guilty under that statute, unless he has "obtained" something by his false pretence. This indictment does not charge these defendants with having obtained any thing by their false pretence; and, therefore, they are not guilty upon it. The indictment may be, and perhaps is, a good indictment against Brewster, who is alone charged with having obtained the fruit of the cheat.

If it should be said, as I understand it to have been said in argument, that if three join in making a false pretence, and one of them obtains the money, &c., all may be said to have obtained it; the answer is, that then the indictment should have averred that they all obtained it; not that one only obtained it, as stated in this indictment. If these defendants did every thing charged against them in the indictment, and nothing more, they cannot be guilty, because it does not charge them with the offence described in the statute, which punishes those only who obtain the fruit of the fraud.

2. The judge refused to instruct the jury,

"1st. That in order to convict the prisoners," (that is, these two defendants, Lucretia and Harriet,) "the jury must believe, from the evidence, that they received the money and check charged in the indictment to have been obtained by false pretences;" and

"2d. That in order to receive the same, they must be present when it was given."

If a person, under the statute, could "obtain" the money, &c., without personally receiving it into his own hands, the judge correctly refused the instruction.

A person who participates in the fraud, and who obtains the benefit of the money, &c., may well be said to obtain the money within the meaning and mischief of the statute.

We think there was no error in refusing this instruction.

3. The judge, also, refused to give the following instruction: "That if the jury believe, from the evidence, that the specific twenty bank-notes, charged, in the third count of the indictment, as obtained by the prisoners, by the false pretences in the said count alleged, were never in the possession of the said party, whose property and money they are charged to be, then the prisoners are entitled to an acquittal."

We think the judge did not err in refusing this instruction. 1. Because that count does not charge that these defendants obtained those bank-notes. 2. Because the bank-notes are not averred to be the goods, or chattels, or money, or property, or bank-notes of the said Thomas Williams.

It is true that this count charges that Williams gave the bank-notes to Brewster, in payment for Lucretia; but it does not directly aver that they were the property of Williams, or were ever in his actual possession. If it had averred that they were the bank-notes of Williams, we doubt whether it would have been necessary to prove them to have been in his actual possession; although in *Walsh's case*, 2 Russell on Crimes, 113, 117, all the English judges decided that the notes which the prisoner had received upon the prosecutor's check, could not be called the prosecutor's notes, because he never had possession of them. Upon this point, however, we do not think it necessary to give an opinion.

4. The judge also refused to give the following instruction: "That all the precedent declarations and doings of the said Jones, Brewster, and Clarke, in the said evidence in this case averred, are merged in the subsequent bill of sale and warranty of Brewster, and that the prisoners, upon this charge, are entitled to an acquittal."

The evidence referred to does not appear in this case, and therefore this Court cannot say that the judge erred in refusing this instruction, for it is a matter of evidence to be left to the jury, who will draw their own inferences from that and all the other evidence in the cause. The prayer is not predicated upon any supposed finding of the jury; and, for that reason also, was properly refused.

5. The judge also refused to give the following instruction: "That if the jury believe, from the evidence aforesaid, that after the conversations and doings of the prisoners, and previous to the consummation of the bargain between Williams and Brewster, the said Williams received from the said Brewster alone, the bill of sale given in evidence, then there is no evidence that the said Williams gave credit to the assertions of the prisoners, and they are entitled to an acquittal."

The evidence referred to is not before this Court, and, therefore, we cannot say that the judges erred in refusing the instruction. But if the false pretences and the subsequent purchase were proved to the satisfaction of the jury, they might in the absence of all contradictory evidence, infer that the purchase was made upon the faith of such pretences. The taking of a warranty, if proved, is a fact also for the consideration of the jury; and the inferences therefrom are to be made, or not, by the jury, according to the preponderance of the evidence upon their minds; and when there is evidence on both sides, the court cannot say there is no evidence on one side, but should leave the matter to the jury. Upon such evidence the court cannot say that the prisoners were entitled to an acquittal. We think the judge did not err in refusing this instruction.

6. The judge also refused to give the following instruction; "That if the jury believe, from the evidence aforesaid, that the check was given to Brewster by Williams, in the absence of the prisoners, they are entitled to an acquittal, notwithstanding said Brewster may have obtained said check, through the previous countenance and management of the prisoners."

This prayer supposes, that if the prisoners were not present when Williams gave the check to Brewster, they were entitled to an acquittal, although they should have participated in the proceeds of the check; and whatever other evidence there might have been.

If these defendants had been charged, in the indictment, with having obtained the check jointly with Brewster, we should not have supposed it necessary to charge or to prove that the three were all present at the time of its being given by Williams to Brewster. We think it would have been sufficient to prove that these defendants obtained their share of it, or of its proceeds, through Brewster.

But these defendants are not charged with obtaining any part of the check or its proceeds; and the evidence referred to in the prayer, is not before this Court. The prayer, therefore, appears to us to be irrelevant; and for that reason, as well as because, if relevant, it ought not to have been granted, we think the judge did not err in refusing it.

7. The judge also refused the following instruction: "That the mere exhibition of Letty Clarke to the said Williams accompanied with the assertion that she was a slave and willing to be sold, is no false pretence, but only a lie; even if the jury should believe she was, at the time, free."

This prayer is not predicated on any supposed finding of the jury. It is therefore abstract; and does not, upon its face, appear to be applicable to the cause on trial. But under the Penitentiary Act, upon which this indictment was framed, the false assertion by the defendants, by which it is supposed they obtained the money, the notes or the check, is, we think, a false pretence within the meaning of that statute. At common law, indeed, the obtaining money by a mere lie, which common prudence could guard against, is not an indictable offence. *Rex v. Wheatley*, 2 Bur. 1127; but that doctrine was not extended to cases under the English Statute of 30 Geo. 2, c. 24, against obtaining money, &c. "by false pretences." *Young et al. v. The King*, in Error, 3 T. R. 98, 100, 102, 103, &c.

In that case the counsel for the defendants, in p. 100, contended that the generality of the words "false pretences," does not extend the law to cases against which common caution may guard. But Lord C. J. Kenyon, in p. 102, says, "undoubtedly this indictment being founded on the statute of 30 Geo. 2, c. 24, is different from a common-law indictment.

"When it passed, it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not; or any occurrence that had not happened; to which persons of ordinary caution might give credit. The Statute of 33 H. 8, c. 1, requires a false seal or token to be used, in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the Statute of 30 Geo. 2, c. 24, introduced another offence, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it. In the present case, four men came to the prosecutor, representing a case as about to take place; that William Lewis should go a certain distance within a limited time; that they had betted upon the event, and that they would probably win. He was, perhaps, too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit that there are certain irregularities which are not the subject of criminal law; but when the criminal law happens to be auxiliary to the

law of morality, I do not feel an inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute." In p. 103, Ashhurst, J., said, "as to the first objection; cases which happened before the passing of the 30 Geo. 2, c. 24, do not apply to this; for that statute created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent; and this statute was passed to protect the weaker part of mankind. The words are very general; 'all persons who knowingly, by false pretences, shall obtain from any person money, goods, &c. with intent to cheat or defraud,' &c. and we have no power to restrain their operation."

BULLER, J., in p. 104, is full to the same effect. He said, "the statute clearly extends to cases which were not the subject of indictment at common law. The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Barely asking for a sum of money is not sufficient; but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute;" and he cites a case in which the pretence was a bare lie, and the whole story a fiction; and in which the prisoner was convicted and condemned under the statute.

It is true that those statutes were not extended in practice to the State of Maryland, and were never in force in this county; but they were known to every lawyer in that State and this county; and there can be no doubt that Congress had them in view when they passed the penitentiary law for this district. It uses the same general terms, "false pretences," without any definition or explanation.

The words of the statute are, "That every person, duly convicted of obtaining, by false pretences, any goods or chattels, money, bank-note, promissory note, or other instrument in writing, for the payment or delivery of money or other valuable thing, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years." It does not, like the English Statute of 30 Geo. 2, c. 24, expressly require that it should be done, "with intent to cheat or defraud any person or persons, of the same," but as the Penitentiary Act seems to consider the offence of obtaining money by false pretences as an offence already well known; and as it was, and could be, only known as the offence created by the English Statute of 30 Geo. 2, c. 24, it seems reasonable that such an intent ought to be con-

sidered as constituting an essential ingredient in the offence named in the penitentiary law.

We are, therefore, of opinion that the judge did not err in refusing to instruct the jury that the exhibition of Letty Clarke to the said Williams, accompanied by the false assertion that she was a slave, and willing to be sold, was not a false pretence.

8. The judge also refused to instruct the jury, "that Letty Clarke's own statements, as against her, were not competent proof of her freedom."

If the word "proof" means evidence only, as we suppose it was intended to mean, the instruction was correctly refused; her voluntary confessions were competent evidence of that fact, as against her, in this cause.

9. The judge was therefore right also in refusing to instruct the jury, "that there was no evidence of the freedom of the said Letty Clarke."

10. And also in refusing to instruct the jury, "that the United States had failed to prove the false pretence alleged, by sufficient proof."

Judgment reversed; and ordered to be arrested.

ZADOCK HEMSTEAD v. JAMES COLBURN.

In actions of replevin, in all cases where judgment is to be entered up for the defendant, it should be for a return.

If, in replevin, upon the plea of property in the defendant, the jury find for the defendant and assess his damages to the value of the goods replevied, the defendant may still maintain an action upon the replevin-bond, and recover damages beyond the value of the goods.

DEBT on a replevin-bond, in the penalty of \$150.

Mr. Marbury, for the plaintiff, moved the Court to order the clerk to extend the judgment in the action of replevin, so as to include a judgment for a return, the verdict having been for the defendant in the action upon the plea of property, with \$81 damages.

After some conversation between the bench and the bar upon the question of practice, the COURT said, that in all cases where judgment is to be entered up for the defendant in replevin, it should include a judgment for a return of the property; CRANCH, C. J., doubting as to cases of *non-pros.* of the plaintiff after declaration. Gilbert on Distresses and Replevins, Ed. of 1757, pp. 231, 232; Dublin Ed. of 1792, p. 167; Bro. Retorn de avers. Pl. 33; Dyer, 280, Pl. 14.

Mr. Marbury then offered to read in evidence to the jury the

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proceedings in the replevin; and the verdict for the defendant in replevin (the present plaintiff) for \$81 damages, being the amount of the appraisement of the goods.

Mr. Redin, contra, objected to his reading the appraisement to show that the \$81 damages were given for the value of the goods, and not for general damages for replevying the goods.

The COURT permitted the appraisement to be read for that purpose.

Mr. Marbury then offered to give evidence of damages over and above the value of the goods replevied; and contended that the jury in replevin cannot give damages for the detention by the replevin, nor for any injury or loss occasioned thereby subsequent to the replevin. These are all covered by the condition of the bond, and can only be recovered by an action upon the bond. *Hopewell v. Price*, 2 Har. & Gill, 275.

Mr. Redin, contra. It does not appear for what the damages were given. They did not merely find the value of the goods under the statute, but have given damages for which the defendant in replevin had judgment, and cannot recover damages again upon the bond. If the plaintiff in replevin had become nonsuit the defendant could not have recovered damages against him, but if upon a plea of property the defendant recovers damages, it is conclusive, and no further damages can be recovered upon the bond.

The COURT (MORSELL, J., *contra*, and CRANCH, C. J., doubting,) permitted *Mr. Marbury* to give evidence of damages consequent upon the replevin.

Verdict for plaintiff. Damages, \$150.

WILLIAM NOYES *et al.* v. WILLIAM L. BRENT, Garnishee of E. Wilmarth, Junior.

A mortgage of all of a man's stock in trade and debts due to him, to secure payment of a debt already due and payable by him to the mortgagee on demand, is void, as to creditors, unless the possession accompanied and followed the deed, although acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5.

THIS was an attachment under the Act of Assembly of Maryland of 1795, c. 56. The garnishee pleaded *nulla bona*.

Mr. W. L. Brent, was in possession of the stock in trade of a shoe-store recently kept by Ezra Wilmarth, junior, in the city of Washington, having taken possession of the same by virtue of a power of attorney, or other authority, from Ezra Wilmarth, senior, (the father of the defendant,) and one Ephraim Foster, (the

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brother-in-law of the defendant,) to whom the defendant had, by bill of sale dated February 14th, 1834, conveyed the same in trust, to secure the payment of \$2,000, due by the defendant to his father by a promissory note to him, of that date, payable on demand; and of \$2,700 due by the defendant to the said Ephraim Foster, by a like promissory note.

The goods are described in the deed, in the following manner: "All and singular the goods and chattels, household furniture and articles as particularly described upon the schedule marked A, annexed to and made part of this instrument of writing, being all the goods and chattels, merchandises and articles now in the store of the said Ezra Wilmarth, junior, on Pennsylvania Avenue, in Washington city in the District of Columbia, and every the debts and sums of money due and owing or payable to the said Ezra Wilmarth, and all books of accounts, bonds, bills, &c.; and also all additional stock, goods, and chattels, merchandises, articles and effects as, with the proceeds of the sale, (or by other means,) of said goods and chattels, merchandises, articles, and effects now in said store, may be purchased by said Ezra Wilmarth, junior, and sent into his store to replace such sales as may have been made by him."

And there is a proviso, that if the said Ezra Wilmarth, junior, should "pay the said several sums of money with interest from this date, or from the date of the said several debts, whenever the said Ezra Wilmarth, junior, shall be requested so to do;" "then these presents," &c., "shall cease," &c.

And "it is further stipulated and agreed, that the said Ezra Wilmarth, senior, and Ephraim Foster, or their heirs or legal representatives, are hereby authorized and empowered, as trustees of the said Ezra Wilmarth, junior, to take possession of all the goods," &c., "herein bargained and sold as aforesaid, at any time they may think proper, and to sell and dispose of them at public or private sale, for cash or for credit, in the manner they may think best; and to pay themselves out of the proceeds thereof; and should any balance remain, after the aforesaid debt, with interest, and costs of sales deducted, then to pay the same over to the said Ezra Wilmarth, junior," &c.

The possession did not accompany and immediately follow the deed; but it was duly acknowledged and recorded according to the Maryland Act of 1729, c. 8, § 5.

Upon the trial of the issue upon the plea of *nulla bona*,

Mr. R. J. Brent, for the garnishee, offered in evidence, the aforesaid deed of trust, with evidence that Ezra Wilmarth, senior, the father of the defendant, was a clergyman in Rowley, in Massachusetts; whose salary was \$240 a year with a parsonage

worth only \$60, or \$80 a year. And that the said Ephraim Foster was the brother-in-law of the defendant, and lived in Boxford in Massachusetts.

Mr. Marbury, for the plaintiff, contended that the possession ought to have accompanied the deed, as it was to secure a present debt, then due and payable, having no time to run, with a power to the trustees to take immediate possession and sell, and no right of possession reserved to the mortgagor. That the possession of the mortgagor was inconsistent with the deed. And he prayed the Court to instruct the jury, that this deed was fraudulent and void, as to the plaintiff, unless the possession accompanied and followed the deed, although it was acknowledged and recorded according to the Maryland Act of 1729, c. 8, § 5.

Mr. R. J. Brent, contra. That principle is applicable only to absolute, unconditional deeds, not to mortgages. The deed recognizes the power of the grantor, to continue to sell the goods, and replace them by the purchase of others; this implies a continued right of possession in the defendant. His possession, therefore, was consistent with the deed. The trustees were not bound to take possession immediately. The debts were not payable until demanded, and whenever demanded, the defendant had a right to redeem; and a court of equity would permit him to redeem at any time before sale. *Hamilton v. Russell*, 1 Cranch, 309; *Edwards v. Harben*, 2 T. R. 594; *The United States v. Hooe*, 3 Cranch, 73; *Conrad v. The Atlantic Ins. Co.* 1 Peters, 449.

It is sufficient if the possession be taken in a reasonable time after the mortgage becomes absolute.

The Act of Maryland, 1729, c. 8, § 5, rebuts the argument as to secret fraud, and removes the objection as to the want of possession.

Mr. Marbury cited 2 Kent, Com. 516; *Gardner v. Adams*, 12 Wend. 297; *Look v. Comstock*, 15 Wend. 244; *Randall v. Cook*, 17 Wend. 53.

The Court, (*nem. con.*) instructed the jury as prayed by *Mr. Marbury*.

Verdict for the garnishee, on the plea of *nulla bona*.

JOHN MOFFIT *et al.* v. RICHARD VARDEN'S Heirs and Executors.

If the executors, inadvertently, pay to some of the legatees more than their shares of the *residuum*, and to others of the legatees less than their shares, and the estate is not sufficient to make good the deficiency, the executors must suffer the loss, or look for reimbursement, to the legatees who have been over-paid.

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If property be devised to the children of A. B. to be divided among them, when they arrive at the age of maturity, the established rule of construction is, that all the children then living, (that is, when the eldest shall have arrived at the age of twenty one,) shall come in for their share, whether born before or after the death of the testator.

The shares of those who have died in the mean time, will have lapsed into the general *residuum*, to be divided among the survivors; and the children born in the mean-time, become entitled to their equal shares with the other children.

If one die after the eldest arrived at the age of twenty-one, and before actual distribution, his share goes to his next of kin, and does not lapse into the *residuum*.

A person who has not been heard of for more than seven years, will be presumed to have died at the end of the seven years.

When the devise is directly to the children of the testator's brother and sister, the devisees take *per capita*, and not *per stirpes*.

BILL IN EQUITY by some of the legatees of Joseph Varden, against the executors and the other legatees.

The bill was filed on the 30th of November, 1836, and charges,

1. That Joseph Varden, after bequeathing \$1,000 to Bishop Neale, in his will made on the 7th, and proved on the 9th of October, 1809, says, "*Item*, I leave all my other property, both real and personal, to be equally divided among the children of my brother, Richard Varden, and my sister, Henrietta Mickum, when they arrive at the age of maturity, that is, twenty-one years old; and I hereby appoint Mr. William Brent and Daniel Brent, of Washington city, executors of this my last will and testament, to see the same carried into effect."

2. That Richard Varden, at the death of the testator, had four children, namely, the complainant, Elizabeth Moffit, widow of Robert Moffit, and the complainant, Matilda Ann Moffit, wife of the complainant, John Moffit; John Varden who had been absent the last six years, and had not been heard from; and Joseph Varden, a minor, about nineteen years old (at the filing of the bill); and Richard Varden, "born after the death of the testator."

That the testator's sister, Henrietta, at the time of his death had two sons, Samuel Mickum, and William Mickum.

3. That the executors took possession of the whole estate, real and personal, rents, issues, and profits, and have from time to time paid various sums of money for the support and maintenance and education of the devisees, but the fair proportion to which the complainants are entitled has not been paid to the m

4. That the complainants, and several of the other devisees, are of full age, and entitled to demand and receive their respective shares.

5. They pray for an account, &c., and that the real estate may be sold by a trustee, &c.

Richard Varden, the infant, answers by guardian that he has been informed and believes, that he was born about three weeks

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after the death of the testator, and insists upon his right to a share of his uncle's estate under the will. Joseph Varden, on the 4th of December, 1828, being of full age, answered, and consented to the sale of the real estate, and admits the facts stated in the bill, and that his brother Richard is entitled to an equal share of the estate. He states that his brother John went to sea, more than eight years ago, and has not since been heard of.

Samuel Mickum answers for himself, and as trustee of Wm. P. Mickum, and admits the facts stated in the bill, in relation to the families of Richard Varden and Henrietta Mickum. He states that he has received less than his share, but is opposed to the sale of the real estate, at this time, (1829,) because it would not then sell for its value. He denies the right of Richard Varden, to any share of the estate, not being *in esse* at the death of the testator, but born perhaps five or six months afterwards. He states that John Varden left Alexandria, as a sailor, on a foreign voyage, in November, 1819, and has never since been heard of except in the early part of 1820, by the master of the vessel in which he sailed, who reported that John had left him in the port to which they were bound. That if John died under age, this defendant claims a proportion of the share which would have fallen to him. That as trustee for Wm. P. Mickum under the Insolvent Law, he claims his share of the estate.

The executors, (June 7, 1828,) answer, and admit the facts concerning the family of Varden, stated in the bill, and that they took possession of the real and personal estate, as executors and trustees under the will, from which they have realized a considerable sum of money, all of which, and more, they have expended in the support and education of the devisees, in keeping the houses in repair, and in the payment of debts, and the legacy of \$1,000 to the Bishop; and they refer to their accounts settled in the Orphans' Court, and exhibit an abstract of payments made by them for the benefit of the devisees, (exhibit A.) amounting to more than \$8,000. They say they have no objection to the sale of the real estate, and pray to be reimbursed out of the proceeds thereof, whatever may be found due to them for their advances.

On the 16th of January, 1830, the usual notice to absent defendants having been published, as to John Varden, the bill was taken for confessed against him, and the papers in the cause were referred to the auditor, to audit and state the account of the executors, and report the sums paid by them to the devisees respectively.

On the 8th of January, 1833, the auditor reported a balance due to the executors of \$637.52. That the whole amount advanced by them to the devisees was \$8,044.90; the equal pro-

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portion of which to each of the seven devisees, including John and Richard Varden, is \$1,149.27 $\frac{1}{4}$.

That the following devisees have received more than their respective proportions, the sums annexed to their names, namely :

Joseph Varden,	\$158.47 $\frac{1}{2}$
Richard Varden,	301.10 $\frac{1}{2}$
William P. Mickum,	463.54 $\frac{1}{2}$

\$923.12 $\frac{1}{2}$

And that the following have received less than their respective proportions, namely :

John Varden,	\$318.41
Elizabeth Moffit,	453.71 $\frac{3}{4}$
Matilda Moffit,	92.64 $\frac{3}{4}$
Samuel Mickum,	58.34 $\frac{1}{2}$

\$923.12

The auditor suggests, in his report, that the sum of \$923.12, which has been overpaid to some of the devisees, and the sum of \$637.52, advanced by the executors, should be paid out of the sales of the land.

The auditor states the objection, made by Samuel Mickum, to the claim of Richard Varden to a share of the estate, and suggests that John Varden may now be considered as dead, and that his share should go to his brothers and sisters, as his next of kin ; and should not, as a lapsed legacy, fall into the residuum devised to all the children of the testator's brother and sister.

On the 28th of March, 1833, the cause was set for hearing, by consent, upon the bill, answers, exhibits, replication, auditor's report, and other proceedings, and the same having been heard, the Court, on the 29th of March, 1833, decreed a sale of the real estate mentioned in the bill.

On the 27th of January, 1837, the trustee reported the sales made in 1833 and 1836, amounting to \$721.

CRANCH, C. J. The cause is now submitted for final decree.

No exception is taken to the balance of \$637.52, reported by the auditor, as due to the executors for advances made by them to the devisees ; nor to the principle assumed by the auditor, that those who have received less than their share of those advances should be compensated out of the proceeds of the sales of the land ; and that the balance due to the executors should be reimbursed out of the same proceeds, if they should be sufficient to pay both ; that is, to put those, who have received less than their share of the advances, upon a par with those who have received

more than their share, and also to pay the balance due to the executors.

It appears by the report that it will require \$923.12, to put all the devisees upon a par as to the advances made by the executors, which, added to the balance of \$637.52, due to the executors, makes the sum of \$1,560.64, to be raised by sales of the land, to do justice to all parties. But the sales produced only \$721; and the question is, how is that money to be applied. Shall the executors receive it and apply it to the settlement of the balance due to them, and leave the deficient devisees to get their money from those who have received more than their shares; or shall those deficient receive it and compel the executors to resort to the devisees who have been overpaid?

If those deficient devisees should sue the executors for the balance of their legacies, or proportion of the sales of the real estate, would it be a good defence for the executors to say that they had overpaid the other devisees? If the deficient devisees should bring a suit against the other devisees to compel them to refund the surplus which they have received, could they recover? Have not the executors made these advances and over-payments in their own wrong? And should they not have taken security to refund? I am inclined to think that the proceeds of the sales of the land should be applied to the equalization of the devisees; and that the executors must look to those devisees who have been overpaid to get back their money.

Then, if the proceeds of the sales of the lands are to be divided among the devisees, it becomes necessary to ascertain who they are; and this presents the question, whether Richard Varden, who was born after the death of the testator, was entitled to an equal share with the other children. I am of opinion that he was. He was *in ventre sa mere*, at the death of the testator; and if the devise had been to all the children living at the testator's death, he would have been a legal devisee. See *Clarke v Blake*, 2 Ves. Jr. 673; 3 Bro. C. C. 320, S. C.; 2 H. Bl. 379, S. C.; and the cases collected in 8 Com. D. Appendix 425, 426, 1 Am. edit. by Day, § 5.

But by this will the property is to be equally divided among the children "when they arrive at the age of maturity."

In such case the legacies do not vest in possession until the eldest of the children arrives at the age of maturity; that is, twenty-one years of age; and in such cases the established rule of construction is, that all the children then living, (that is, when the eldest shall have arrived at the age of maturity,) shall come in for their share, whether born before or after the death of the testator. See *Barrington v. Tristram*, 6 Ves. 345, and the cases in

8 Com. Dig. 425, 426 ; *Titcomb v. Butler*, 3 Simons, 417 ; and *Balm v. Balm*, Id. 492.

The reason of this rule is, that when one of the legatees becomes entitled to receive his share, it is necessary to ascertain the whole number of legatees among whom the estate is to be divided.

The shares of those who have died in the mean time, will, I apprehend, have lapsed into the general residuum, to be divided among the survivors ; and the children born in the mean time become entitled to their equal shares with the other children.

The time when the eldest of the children arrived at the age of maturity is not ascertained in these proceedings, nor the precise time of the birth of Richard Varden. He states, in his answer, that he has been informed and believes that he was born about three weeks after the death of the testator, who died on the day of the date of the will, or on the next day ; for the will was made on the 7th and was proved on the 10th of October, 1809 ; so that unless one of the legatees came of age within three weeks after the death of the testator, Richard was entitled to his share.

The time of the death of John is not ascertained. If he died before the eldest of the children came of age, his share lapsed into the residuum. If he died after, his share vested in him, and goes to his next of kin, in equal degree. He went to sea in 1819, and has not been heard of since the beginning of the year 1820. In analogy to the statute of bigamy, the presumption of death arises if seven years have lapsed since the party has been heard of ; so that it may be presumed that he died in the beginning of the year 1827. The bill in this case was filed November 30, 1826, and states that the complainants, and several of the other legatees, were then of full age ; so that there is a strong presumption that John's legacy vested before his death ; and that it should go to his next of kin, namely, his brothers and sisters.

The devise in this case, being directly to the children of the testator's brother and sister, the devisees take *per capita*, and not *per stirpes* ; and each is entitled to an equal share.

MORSELL, J., concurred in the result of this opinion, but thought the legacies vested in possession in the legatees at the death of the testator, and not when the eldest child came of age.

THRUSTON, J., absent.

NEGRO MOSES GRAHAM v. RICHARD B. ALEXANDER.

If a female slave be sold in Alexandria county, "she to be free at thirty-one, and her children then born, and those afterwards to be born, at the same age," a child afterwards born of such slave before her age of thirty-one, is entitled to freedom when arrived at the age of thirty-one years.

THE jury found the following special verdict : We find that the

petitioner is the son of Milly, who was the slave of Miss Brown, who resided in Georgetown about the year 1790 ; and for two or three years afterwards, with her sister Mrs. Magruder. That she afterwards lived with the same sister in Maryland ; and afterwards, but not before 1806, with her sister, Mrs. Alexander, in Alexandria county. That during all this time, the petitioner's mother and grandmother belonged to Miss Brown, who some time about the year 1813, while she was living with Mrs. Alexander, brought Milly from Washington county, where she had been living hired out by her mistress for one or two years, to Mrs. Alexander's, in Alexandria county. That Milly then had two female children, and that the petitioner was born afterwards, and while Milly was at Mrs. Alexander's. That Miss Brown, on bringing her to Mrs. Alexander's, sold Milly and her two children to Mrs. Alexander ; she to be free at thirty-one, and her children then born, and those afterwards to be born, at the same age. That the petitioner was held by Mrs. Alexander during her life, and by her administrator, the present defendant, since ; not as a slave for life, but as entitled to freedom at thirty-one years of age. That Miss Brown died in 1825, making her last will and testament as follows : " (In this will she says, " Whereas I have sold to my sister Alexander a negro woman called Milly, and her two children Ann and Rachel, since which time the said Milly has had two other children, Jenny and Christy ; and whereas the term for which the said Milly was sold, has expired, and her said children are bound to serve till they shall have attained the age of thirty-one years respectively. Now it is my will and desire, that the time of the said four children of Milly, shall be purchased by my executor, and that they shall be forthwith emancipated by him ; and I do hereby authorize him to make such purchase out of the estate I shall leave. But as the amount for which I sold the said Milly and her two children, has never been paid to me, it is my desire that that debt shall be applied, if practicable, towards the said purchase.")

That Miss Brown, by her will, recognized the terms of sale of said negroes, to her sister, to be, that they were to be free at thirty-one years of age. That the petitioner will be, on the 25th of December, 1839, twenty-six years of age. That Miss Brown sent an officer for Milly to Georgetown, where she (Milly) was then residing, and from whence she was brought, in 1813, to her sister's, with the intention to sell her and her children to her sister, and did thereupon, sell her as before stated, on the terms and conditions stated in her will ; and that the said Milly was kept in Alexandria county from the time of her said importation, till she became thirty-one years of age, when she was suffered to go free, and is free now ; and the petitioner was so kept in the said

county, till the filing of this petition. That Miss Brown, when she had the said Milly and her two children brought into Alexandria county, or at any time before or afterwards, did not take the oath required by the fourth section of the Virginia Act of 17th December, 1792.

And if, upon the facts aforesaid, the law be for the petitioner, then we find for the petitioner, and if otherwise, for the defendant."

Messrs. Swann & Swann, for the defendant, contended that the petitioner had no claim to freedom under the will of Miss Brown, as he was not named nor referred to therein; and there was no evidence of his emancipation under any other instrument in writing, under hand and seal, and acknowledged, or proved as required by the Virginia law of December 17, 1792, c. 103, § 36, p. 191, and that no parol evidence is sufficient to prove emancipation in any other manner. *Roberts on Wills*, 26.

But the COURT (*nem. con.*) made the following order: "Upon consideration whereof," (that is, of the special verdict,) "the COURT is of opinion that the petitioner will be entitled to his freedom on the 26th of December, which will be in the year 1844, and not before; and therefore that the judgment at law, upon the said special verdict, must be for the defendant. But, inasmuch as the said petitioner has filed his bill in equity, stating his fears that the said defendant, Richard B. Alexander, will remove the petitioner from the District of Columbia, under the laws whereof his claim for freedom has accrued, and from the jurisdiction of this Court, before the said 26th day of December, 1844, whereby he may be deprived of the means of establishing his right to freedom when it shall have become absolute:

"It is this 18th day of February, 1840, ordered that the said defendant, Richard B. Alexander, shall not be permitted to take the said petitioner into his possession, (the said petitioner being now in the custody of the marshal for safe-keeping, and for the protection of the rights of the said petitioner,) until he, the said Richard B. Alexander, shall have given bond to the United States with good security in the penalty of \$1,000, with condition to be void, if he shall have the said petitioner forthcoming, and produce him to this Court, or to the marshal of this district on the aforesaid 26th day of December, 1844; the said bond and security to be approved by this Court, or one of the judges thereof; Provided, however, that the said petitioner, Moses Graham, shall have first given security to the said Richard B. Alexander by bond with good security, to be approved by this Court, or one of the judges thereof, in the penalty of \$800, conditioned that he, the said Moses, shall continue faithfully in the service of the said Richard

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B. Alexander, in the District of Columbia, until the said 26th of December, 1844. And upon the said bonds being given and approved as aforesaid, and filed in this Court, or in the clerk's office, the said petitioner shall be delivered up to the said Richard B. Alexander, upon demand."

JOHN H. GODDARD v. R. MOCKBEE.

If a third person receive money from the debtor to pay the debt due to the creditor, and in consideration thereof promise the creditor to pay it, he is liable to the creditor in an action for money had and received; and the case is not within the statute of frauds, although there be no note or memorandum in writing to charge the defendant.

ASSUMPSIT for money had and received by the defendant for the use of the plaintiff.

At the trial the plaintiff offered evidence tending to prove that a certain R. Mockbee, being indebted to the plaintiff in the sum of \$110, made his promissory note dated February 1, 1837, payable to the order of the plaintiff sixty days after date, which note was produced by the plaintiff at the trial. That after the date of the note the defendant received from Mockbee a considerable amount of goods, &c., and acknowledged to a competent witness that he had received the said property to pay the creditors of Mockbee, and that there was sufficient for that purpose, especially to pay the preferred creditors, among whom was the plaintiff. That the defendant afterward acknowledged that he had the greater part of the property, and had paid a curtailment on the note to the plaintiff.

Whereupon, the defendant prayed the Court to instruct the jury that upon the evidence aforesaid the plaintiff is not entitled to recover.

But the COURT (*nem. con.*) refused.

The defendant then prayed the Court to instruct the jury that if they believe from the said evidence that the plaintiff holds the said Mockbee's note for the debt and has never released him from the debt, then the understanding of the defendant was collateral, and the plaintiff is not entitled to recover, although the defendant may have verbally promised to pay the plaintiff, upon a full consideration passed to him by the said Mockbee.

Which instruction the COURT also refused to give.

The defendant then prayed the Court to instruct the jury that if they believe, from the evidence aforesaid, that the said Mockbee, being largely indebted, assigned to the defendant certain per-

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sonal property, upon his assumption to said Mockbee to pay the creditors of the said Mockbee; and that at the time of the said assignment and assumption the plaintiff was the holder of the note aforesaid, and still holds the same, never having released the said debt; but the same being still a subsisting debt in full force; and that after receiving the said property the defendant acknowledged verbally that he had sufficient to pay the preferred creditors of the said Mockbee, among whom was the plaintiff; and afterwards acknowledged that he had sold the greater part of the said property, and had paid the curtails upon the said note; then there is no evidence of any promise in writing by the defendant to pay the debt of the said Mockbee, and the plaintiff is not entitled to recover.

Which instruction the COURT also refused to give.

The defendant then prayed the Court to instruct the jury that if they believe that the said note was made and indorsed for the accommodation of the said Mockbee, and that the plaintiff was but an indorser, then, to entitle the plaintiff to recover, it is necessary that he should prove that the said note was discounted, or put into circulation; and that some consideration has been paid by the plaintiff for the note or on account of the same.

But the COURT refused this instruction also.

Mr. R. J. Brent, for the defendant, cited *Weston v. Barker*, 12 Johns. 276; *Elting v. Vanderlyn*, 4 Id. 237; *Marshall v. Bronaugh*, in this Court; *Rice v. Barry*, also in this Court, (2 Cranch, C. C. 447); *Devolf v. Rabaud*, 1 Peters, 475, 501.

Mr. Hoban, for the plaintiff, cited *Roberts on Frauds*, 234; *Hughes v. McDermot*, in this Court at last term; *Olmstead v. Greenly*, 18 Johns. 12; 5 Wheeler, 510; *Cleveland v. Farley*, 9 Cowen, 639.

Verdict for the plaintiff.

LEWIS H. FRANCE v. CORPORATION OF WASHINGTON.

The Corporation of Washington has power, under the charter of May 15, 1820, § 7, "to provide for licensing, taxing, and regulating," "venders of lottery tickets," although the tax may be so high as to amount in effect to a prohibition; and to require the applicant for a license to deposit the license-money in bank before the issuing of the license.

APPEAL from the judgment of a justice of the peace, for the penalty of twenty dollars, for exercising and dealing in the business and employment of a vender of lottery tickets, in the city of Washington, on the 25th of February, 1840, contrary to the by-law of the 25th of October, 1838.

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The words of the charter upon this subject, are "That the corporation aforesaid shall have full power and authority" "to provide for licensing, taxing, and regulating," "venders of lottery tickets;" and "to restrain or prohibit lotteries."

By the first section of the by-law of the 25th of October, 1838, it is enacted, "That it shall not be lawful for any person or persons within the limits of this corporation to exercise or deal in the business or employment of vender of lottery tickets, without having first obtained a license for such purpose from the mayor." "And that before the mayor shall grant such license there shall be paid into bank, according to the Act of May the thirty-first, eighteen hundred and thirty-six, for the use of this corporation, by the person or persons applying for such license, the sum of three hundred dollars."

And by the second section, it is enacted, "That if any person, or persons, shall, from and after the passage of this act, exercise, or deal in the business or employment of vender of lottery tickets, within the limits of this corporation, without having first obtained a license for such purpose, as required by the first section of this act, he, she, or they shall forfeit and pay to this corporation, the sum of twenty dollars for each and every day, he, she, or they shall so offend, to be recovered and distributed as is by law provided for the recovery and distribution of fines."

By the first section of the by-law of May 31, 1836, it is enacted, "That from and after the 30th day of June next, all money due, accruing, or receivable by the corporation, except the taxes upon real and personal property, and wharfages, shall be paid by the person making the same, directly into the bank in which the deposits of the corporation are or shall be made; which bank shall issue to the person a certificate therefor; and no license shall be issued or credit given, by any officer of the corporation, for a payment made, except upon a surrender of such certificate of deposit, as hereinbefore provided."

Messrs. Brent & Brent, for the appellant, contended that the charter gave the corporation power to license only, not to prohibit the exercise of the business of vender of lottery tickets. That the tax of three hundred dollars amounts to a prohibition, and exceeds the power given, and is, therefore, void. They contended, also, that the corporation had no authority to require the applicant for a license to pay the money into any bank as a condition of granting the license.

But the COURT (*nem. con.*) overruled the objections, and affirmed the judgment, with costs.

DARIUS CLAGGETT v. THOMAS WARD.

If the defendant has been discharged under the insolvent law of Maryland the bail will be exonerated.

MOTION by *Mr. R. J. Brent*, for an *exoneretur* upon the bail-piece, the defendant having been discharged under the insolvent law of Maryland. *Beers et al. v. Haughton*, 9 Peters, 329.

Mr. Morfit, for the plaintiff, contended that as the law of Maryland went to discharge the debtor from the obligation of the contract, and as this debt was not contracted in Maryland, the act of Maryland, so far as it impaired the contract, was unconstitutional and void; and cited *Gordon v. Turner*, 5 Har. & Johns. 369; *Hickley v. Farmers Bank*, 5 Gill & J. 377; 3 Story's Com. 340, 365; *Smith v. Buchanan*, 1 East, 50; *Campbell v. Claudius*, Peters's C. C. Rep. 484; Constitutional Class Book, 82. He also contended, that upon the principle of comity, a discharge in Maryland could not affect a citizen of this district, because a discharge here does not affect a non-resident creditor.

The COURT (THRUSTON, J., absent,) ordered the *exoneretur* to be entered, upon filing the certificate of discharge of the debtor in Maryland.

 NEGRO ANN BELL AND CHILDREN v. GERARD T. GREENFIELD.

A will, not admitted to *probat*, is not admissible evidence in favor of the petitioners for freedom.

THE petitioners claimed their freedom under a paper purporting to be the last will and testament of Gabriel P. T. Greenfield, of Maryland.

The will, upon *caveat*, had been admitted to *probat*, by the Orphans' Court; but the sentence of that court had been reversed in the Court of Appeals.

It was agreed by the parties in this Court, that the petitioners might read in evidence from the record of the Court of Appeals of Maryland the paper purporting to be the will of Gabriel P. T. Greenfield, and the depositions taken in support of it; and that the defendant might read the depositions in the same record taken on the part of the *caveator*, in the same manner, and to have the same effect, (and no other,) as if the original paper purporting to be a will was now produced, and the witnesses for and against it were now examined *vivâ voce*.

Under that agreement the petitioner's counsel offered the paper in evidence, together with the depositions, to the admissibility of which the counsel of the defendant objected, that it was not a valid will until *probat*; and that the *probat* had been conclusively refused by the highest court in Maryland.

Mr. Marbury and *Mr. R. S. Coxe*, for the defendant, cited *The King v. Netherseal*, 4 T. R. 259, 260, in which Lord Kenyon, C. J., said, "Nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will, in all questions respecting personalty."

Mr. Bradley and *Mr. W. L. Brent*, *contrà*, contended that the rule did not apply to questions of freedom which were not questions respecting personalty. The judgment of the Court of Appeals could not affect the petitioners who were not parties to that controversy, and could not appear to sustain their rights. The only right which they have is to appear in this Court and petition for their freedom. The reversal was upon grounds not affecting the manumission. The parties might have colluded in the Orphans' Court to deprive those petitioners of their rights. It was not a judgment *in rem*. If it were, it is only conclusive against those who could contest it.

Mr. R. S. Coxe, in reply. The sentence of the Orphans' Court is annulled by that of the Court of Appeals. It is no will of personal property until proved in the Orphans' Court. In the case of *Armstrong v. Lear*, 12 Wheat. 175, 176, the Supreme Court say, "By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical courts; and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those courts." "This principle of the common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper Orphans' Court here exercising ecclesiastical jurisdiction. If this be so; and nothing has been shown which leads us to a different conclusion, then it is indispensable to the plaintiff's title to procure, in the first instance, a regular probate of this testamentary paper in the Orphans' Court of this district and to set forth that fact in his bill. The treaty stipulations, the act of Congress, and the principles of the law of France which have been cited at the argument; attributing to them the full force, which that argument supposes, to establish the validity of the instrument, do not change the forum which is entitled, by the local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing to possess proofs which may be sufficient to establish that a testamentary instru-

ment had been executed in a foreign country under circumstances which ought to give it legal effect here; and quite a different thing to ascertain what is the proper tribunal here, by which those proofs may be examined, for the purpose of pronouncing a judicial sentence thereon."

There must be the same evidence of a will, in cases of freedom as in other cases respecting personal rights. *Mima Queen v. Hepburn*, 7 Cranch, 290.

The decree was *in rem*; upon the will itself; and binds all the world. If the petitioners are not bound by the decree rejecting the will, they could not claim under the will if proved. The rule works both ways.

The COURT (THRUSTON, J., *contrà*,) refused to permit the paper to be read in evidence to the jury as a will or testamentary paper.

Mr. W. L. Brent, then offered to read the paper to the jury as an instrument of manumission, under the 29th section of the Maryland Act of 1796, c. 67, and contended that it is not necessary that the instrument of manumission should be signed or acknowledged by the party. That clause of the section which requires acknowledgment and recording applies only to manumissions intended to take effect in future; not to present manumissions.

But the COURT (THRUSTON, J., *contrà*,) refused this also.

PETER KURTZ v. JOHN H. BECKER AND J. DOVE.

In covenant against two, if one plead infancy, and it be found for him, the plaintiff may enter a *nolle prosequi* against him, and have judgment against the other.

COVENANT, against John H. Becker and John Dove. Becker pleaded infancy, and the jury found a verdict for him upon that issue. The plaintiff entered a *nolle prosequi* as to him, and obtained a verdict against Dove.

Mr. Brent, for Dove, moved in arrest of judgment; and cited *Green v. Charnoe*, Cro. El. 762.

Mr. Bradley for the plaintiff, cited *Minor v. Mechanics Bank*, 1 Peters, 73.

The COURT (*nem. con.*) overruled the motion and ordered the judgment to be entered up against Dove.

Brent v. Smith.

ROBERT Y. BRENT, Executor of R. Brent, for the use of the
United States v. FLEET SMITH.

The purchaser of lots in the city of Washington, by the square foot, is not bound to pay for a proportion of the alleys, if there be no special agreement to that effect.

THE bill in equity in this case states that this suit is brought for the use of the United States. That about the 23d of November, 1826, at a sale made by the executors of Robert Brent for the purpose of paying a debt due by him to the United States, the defendant became the purchaser of lots 15, 16 and 17, in square 533, in the city of Washington, and has paid only part of the purchase-money, leaving \$1,748.15 unpaid with interest from the 23d of November, 1826, and costs of a judgment at law obtained against him, on the 13th of April, 1835, for \$3,000, damages and costs; the damages to be released on payment of \$1,748.15 with interest from the 23d of November, 1826, till paid, and \$12.59 costs.

That the defendant has no property on which the judgment can be levied. That no title has been made to the defendant, who refuses to give up the lots so that they may be sold to pay the purchase-money.

The plaintiff prays that the defendant may be decreed to pay the judgment and costs by a certain day; and in default thereof that the lots may be resold, or as much thereof as may be necessary, to raise the amount due; and for general relief. The bill was filed on the 26th of March, 1836.

The answer of the defendant admits the provisional contract of the 23d of November, 1826, subject to the future confirmation of Joseph Pierson and R. Y. Brent, executors of Robert Brent, and of Stephen Pleasanton, agent of the Treasury, for the purchase of the three lots at twenty-five cents per square foot for lot 15; and at twenty cents for lots 16 and 17. "In pursuance whereof," he says, "they," (the executors) "did, on the 27th of June, 1827, enter into a written contract with this defendant, under the seals of the said parties, reciting the said provisional contract, confirming and adopting all the terms of the same as so recited, and expressly covenanting to convey the said lots to this defendant in fee-simple upon his payment of the note mentioned in the said written contract to be given by him to them for the balance of the purchase-money;" and he exhibits a copy of the contract of the 27th of June, 1827. He admits that he, at the same time, made, and delivered to the executors, his promissory note for the supposed balance of such purchase-money; "such balance being then

erroneously calculated and supposed to amount to \$1,748.15, upon which note the judgment mentioned in the said bill was recovered against him. But this defendant has recently and since the judgment, discovered that in the settlement," &c., "a material error to his disadvantage was made by the executor in calculating the amount of such purchase-money by the quantity of square feet contained in said lots, and the stipulated rates to be paid for the same according to the said contract; which error was committed by the said executors themselves, who represented to this defendant the quantities of square feet contained in the said lots to be such as produced the supposed balance for which he gave his said note; and this defendant, ignorant, at the time, and until recently, as aforesaid, continuing ignorant of the error and misrepresentation of said executors, trusted implicitly to their statement and calculation of the amount of such purchase-money; and, under such ignorance, gave his said note," &c. He admits the true balance, for which he ought to have given his note to be \$1,406.67, instead of \$1,748.15. He avers that the said written contract of 27th of June, 1827, is the true, genuine, and only contract of sale for the said lots, and expresses the true and only terms of the contract.

The question submitted to the Court, is, whether the defendant, under that contract, was chargeable with a proportion of the alleys in that square.

CRANCH, C. J., delivered the opinion of the Court.

The memorandum of the 23d of November, is signed by Daniel Brent only, and not by the defendant; it is therefore void as to the defendant, under the statute of frauds. It is not produced as an exhibit by either party. Mr. W. Brent testifies that the defendant agreed to pay for the proportion of the alleys; but no parol evidence can be admitted to vary the contract under seal. That written contract recites a former verbal agreement, and so far as it recites it, and no further, is it evidence of such previous agreement. It cannot be extended by parol evidence. The written agreement of the 27th of June, 1827, must be considered as the only contract of sale; and that says nothing of the alleys. I think, therefore, that the note must be considered as having been given, if not by misrepresentation, yet by mistake.

The case of *Pratt et al. v. Campbell*, has decided that the purchaser by the square foot is not bound to pay for the proportion of the alleys, where there is no special agreement to that effect.

Decree accordingly.

THRUSTON, J., concurred.

MORSELL, J., gave no opinion.

MADISON JEFFERS v. JOSEPH FORREST.

If the appellant from the judgment of a justice of the peace, die pending the appeal, and no further proceedings are had in the cause for two terms thereafter, the sureties in the appeal-bond are not liable for the appellant's not having prosecuted his appeal with effect.

DEBT upon an appeal-bond in the penalty of \$100. The breach assigned was in not prosecuting the appeal with effect.

The defendant pleaded that the appellant died pending the appeal, and that at the third term after the death the appeal was abated and discontinued.

Upon demurrer, judgment was rendered for the defendant.

NEGRO JAMES ASH v. WILLIAM H. WILLIAMS.

In the will of Maria T. Greenfield is the following clause, "I also give and bequeathe to my nephew Gerard T. Greenfield, all my negro slaves, namely, Ben, Mansa, James, &c., (naming seventeen slaves,) provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events I will and desire the said negroes to be free for life." The legatee sold one of them, (the petitioner) to the defendant. Held, that the petitioner thereby became entitled to his freedom.

THE petitioner claimed his freedom under the clause of the will recited in the margin.

Upon the death of the testatrix, the legatee, who was also executor, took possession of the petitioner and the other slaves bequeathed to him by the will and held them until he sold the petitioner to the defendant.

Mr Bradley, for the petitioner, contended that it was a bequest of freedom to the slaves, upon the occurrence of the event of removal or sale. This is a limitation over, in the event of the sale or removal of the negroes by the legatee. Although they are personal property, yet they are also recognized as persons, and are so called in the Constitution of the United States; and are capable of receiving a bequest of freedom; even an implied bequest. *Dolly Mullen's case*, 5 Har. & J. 190; *Wheeler's Law of Slavery*, 183, 252; *Fitzhugh v. Foot*, 3 Call, 13; *Legrand v. Darnell*, 2 Peters, 664; *Wallingsford v. Allen*, 10 Peters, 583; *Menard v. Asparia*, 5 Peters, 505; *Lee v. Lee*, 8 Peters, 44; *Boyce v. Anderson*, 2 Peters, 154, 155; *McCutchen v. Marshall*, 8 Peters, 220.

This is a question of intention. The testatrix had a right to dispose of her property absolutely, or *sub modo*. She had a right to bequeathe freedom, conditionally, or in a certain event; and

when the event occurs, the right to freedom becomes absolute. *Dommatt v. Bedford*, 6 T. R. 684; *Gill v. Pearson*, 6 East, 173; *Powell on Devises*, 265; *Smith v. Bell*, 6 Peters, 74; *Gulliver v. Poyntz*, 3 Wils. 141; *Bradley v. Peixoto*, 3 Ves. 324; *Brandon v. Robinson*, 18 Ves. 429; 1 Russ. & Miln. 364; *Hall v. Smith*, 14 Ves. 429.

Mr. Marbury and *Mr. Jones*, *contrà*, contended that the prohibition to sell or remove the slaves is repugnant to the bequest and therefore void; and that the bequest vested an absolute right to the slaves in the legatee. There is no difference in the decision of cases of freedom, and other cases; nor in the construction of wills. *Mima Queen v. Hepburne*, 7 Cranch, 290; *Corcoran v. Jones*, in this Court at last term, (*ante*, 607); *Bradley v. Peixoto*, 3 Ves. 324; *Newkerk v. Newkerk*, 2 Caines, 345.

The COURT, (CRANCH, C. J., and MORSELL, J., doubting,) at the prayer of the petitioner's counsel, instructed the jury, that by the fact of the sale of the petitioner the estate or property in the petitioner so bequeathed to the said Gerard T. Greenfield, ceased and determined; and the petitioner, thereupon, became entitled to freedom as claimed in his petition.

CRANCH, C. J., delivered the following opinion.

The petitioner claims his freedom under the following bequest in the will of Maria Anna T. Greenfield, dated September 16th, 1824. "I also give and bequeathe to my nephew Gerard T. Greenfield, all my negro slaves, namely, Ben, &c., (naming seventeen); provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events I will and desire the negroes to be free for life."

Here is a clear bequest of freedom to the slaves upon the happening of a certain event, which has happened; for it is admitted that the said Gerard T. Greenfield, sold the petitioner to the defendant. The condition, in the bequest, that the legatee should not sell the slaves may be repugnant to the bequest of the slaves to the legatee, and may therefore be void as a condition, and the bequest may be absolute to him; but that does not prevent the happening of the event upon which the bequest of freedom to the slaves also became absolute. Here then are two absolute bequests inconsistent with each other; in which case the last of the bequests must prevail, as being the last will of the testatrix.

But the bequest of freedom to the slaves is not a condition annexed to the bequest of the slaves to Gerard T. Briscoe. It is an independent bequest which has become absolute upon the happening of a certain event; and the circumstance, that that event consisted of an act done in the supposed violation of a condition which is void, as being repugnant to the legacy to G. T.

Greenfield, does not affect the truth of the fact, that that event has happened ; to wit, the sale of the petitioner, by which his title to freedom became absolute.

There is another view of the subject. The owner of property has a right to dispose of it as he pleases, either absolutely, or *sub modo* ; or to grant or bequeathe a temporary use of it, reserving to himself an ultimate right of property.

It is true that if he parts with his whole interest in the thing to his legatee, with condition that the legatee shall not alienate it, such condition is void, and the bequest is absolute. But if any right or interest in the thing remains in the testator, and not bequeathed to that legatee, he may annex such condition, for it is not repugnant to that bequest. This remaining right or interest may be bequeathed over, or pass to the next of kin, as being undisposed of by the will.

The intention of the testator is the rule of construction of the will. In the present case the question is, whether the testatrix intended to devise to G. T. Greenfield such an estate in, or right over, these slaves, as would enable him to carry them out of the State of Maryland, or to sell them.

It is very clear that she did not, for she has plainly declared her will that he should not sell or remove them, by giving them their freedom, if he did.

The words of the legacy to G. T. Greenfield, therefore, which, without the proviso, and bequest of freedom to the slaves, would have given him an absolute right to them, are restrained by that proviso, and that subsequent legacy of freedom, which operate upon the supposed absolute legacy to G. T. Greenfield, exactly as the devise of the remainder to the son in the case of *Smith v. Bell*, (6 Peters, 74,) operated upon the absolute devise to his mother ; namely, by limiting and restraining the supposed absolute bequest to G. T. Greenfield, and show that she did not intend to give him an absolute estate in the slaves. (See Preston on Estates, 38, 42, 43, 45, and 46.) If she had said, I give and bequeathe all my slaves to G. T. Greenfield, provided they shall be free at his death ; according to the case of *Smith v. Bell*, the estate, under such a bequest, to the said G. T. Greenfield, would be only an estate for life ; and, *a fortiori*, if she had restrained him from selling or removing them. There is only this difference ; that the death of G. T. Greenfield was an event which must certainly happen, and his sale of the slaves might never happen ; but although his death would be certain, yet it would be uncertain whether he would die before the slaves. There would, therefore, be an uncertainty in both cases ; and the uncertainty of the event cannot deprive the slaves of the benefit of it, if it should happen.

It is a mere question of construction of the will, which construction must be governed by the intent of the testatrix, derived from a view of the whole will.

If she had said, in her will, that her slaves should be free at the death of her nephew, and that, in the meantime, he should not remove nor sell them, but should be entitled to their labor and services, I can see no reason why this should not be a good bequest of freedom to the slaves who should be alive at his death; and I think that a similar construction should be given to this will upon the event of a sale.

The law of Maryland which authorizes the owner to manumit his slaves by his last will, makes them capable of taking their freedom under such a bequest, although the manumission should be intended to take effect at a future time or upon a contingent event.

If it should be said that these slaves may be taken in execution against G. T. Greenfield, and sold as his property, the same may be said of any other bequest of slaves subject to a contingent right, to freedom at a future day; but I apprehend nothing more could be sold under the execution than the right, title, and interest of the legatee. If the sale should be by collusion with the creditor to defeat the right of freedom, I suppose it might be set aside on the ground of fraud.

But it has been said, in argument, that this bequest of freedom to the slaves is void because it is upon an unlawful condition. The condition of this bequest, (if it be a condition,) is, that G. T. Greenfield should remove or sell the slaves. But it is contended by the defendant that such removal or sale is not unlawful; and, if so, the bequest is not upon an unlawful condition. But the sale is not the condition of the bequest; it is only the event, or fact, upon the happening of which the bequest is to take effect; and whether that sale be lawful or unlawful the effect upon the petitioner's right to freedom is the same.

Verdict for the petitioner. Bill of exceptions taken by the defendant.

McFERRAN AND DUNCAN v. WHERRY.

If an attachment, under the Maryland Act of 1795, c. 56, and a *capias ad respondendum*, be both served while the defendant is attending the Court as a party in another cause, the attachment will be ordered to be dissolved upon the arrest of the defendant on the *capias*, and the defendant will be discharged from the arrest, because privileged as a suitor in another cause.

AN attachment under the Maryland Act of 1795, c. 56, was laid in the hands of the Chesapeake and Ohio Canal Company on

the 24th of December, 1839, the defendant, being a non-resident, was attending this Court as a party in another cause. With the attachment a *capias ad respondendum* was issued on the same day upon which the defendant was taken; and the marshal returned the attachment "laid in the hands of the Chesapeake and Ohio Canal Company," and returned the *capias* "*cepi*." The defendant being brought in by the marshal, moved to be discharged, because, as a suitor in this Court, in another cause, he was privileged from arrest during the term, &c. And the Court (MORSELL, J., absent,) discharged him from the arrest, and did not require him to enter his appearance in the suit; and ordered the return of the attachment to be quashed, because the defendant was present when the attachment was served; and the defendant could not be compelled to appear, either by *capias*, or by means of an attachment of his effects, during the term, and while the defendant was thus privileged from arrest as a party.

Mr. R. J. Brent now moved the Court (THRUSTON, J., absent,) to rescind the order to quash the return of the attachment, and cited several cases to show that the attachment is intended as a means to compel an appearance to the action, and that the attachment cannot be dissolved without special bail.

The Court (THRUSTON, J., absent,) refused to rescind the order to quash the return of the attachment; and ordered the attachment to be dissolved. See *United States v. Stansbury*, 1 Peters, 573.

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ABATEMENT.

1. That one of the grand jurors, who found the indictment, had previously expressed an opinion that the defendant was guilty of the offence, is no ground for a plea in abatement of the indictment. Exceptions to grand jurors, for favor, are only cause of challenge before they are sworn, or before indictment found, not of a plea in abatement. *United States v. Richard H. White*, 457.
2. A plea in abatement, not upon oath, may be treated as a nullity; and will be ordered to be stricken out. *Fenwick v. Grimes*, 603.
3. A plea in bar overrules a plea in abatement. The order of pleading is part of the common law, and does not depend upon a mere rule of the court. *Ibid*.

ACKNOWLEDGMENT.

In 1823, the commissioner of public buildings in Washington had authority to take the acknowledgment of deeds of land in Washington County, D. C. *Middleton v. Sinclair*, 409.

ACTION ON THE CASE.

The reversioner cannot maintain an action on the case against a stranger who, by persuasion or threats, induces the tenant to attorn to a third person, it not being done maliciously. *Brown et al. v. Corcoran*, 610.

ADMINISTRATION.

1. A justice of the peace has not jurisdiction of an action against an executor; and money paid by the defendant in such a case, while in commitment upon a *ca. sa.* issued upon the judgment of the justice, was money paid by duress, and may be recovered in an action for money had and received. *Foy v. Talburt*, 124.
2. The Orphans' Court for the county of Alexandria, D. C., has authority, under the law of Virginia, to regulate and fix the compensation of an executor in settling the estate, and for that purpose may order an inventory to be taken, and an appraisement to be made, although the will directs that no inventory shall be taken. *Atkinson v. Robbins*, 312.
3. The rights of the parties under the will are to be decided by the law of Virginia; the powers and jurisdiction of the Court are to be ascertained by the law of Maryland referred to by the Act of Congress, erecting the Orphans' Court. *Ibid*.
4. If a sealed note be given to R. H. F., one of the executors of Thomas Whittington, it is not necessary that all the executors should join in the action. *Foote v. Noland*, 399.
5. The settlement of an administration account by the Orphans' Court is conclusive upon this Court against distributees and residuary legatees, except by appeal; although not conclusive against creditors upon a question of *devastavit* or *plene administravit*. It is a part of the ordinary duty of the Orphans' Court to ascertain and distribute the surplus, or *residuum* of the estate of a deceased person, and for that purpose to settle the administration account. The jurisdiction of that Court in that matter, is original, peculiar, and exclusive.

An original bill in the Circuit Court to compel an executor to account with a residuary legatee, and not necessarily connected with any other ground of equitable jurisdiction, is a bill asking that court to do what originally belongs exclusively to the Orphans' Court to do. The Circuit Court has not jurisdiction of such an original bill. *Lupton v. Janney*, 474.

ADMINISTRATION, (*Continued.*)

6. A Court of Equity will not lend its aid to enforce an unconscientious claim. *Lupton v. Janney*, 474.
7. It is a matter within the discretion of an executor whether he will incur the expense of a suit against a known insolvent debtor of the estate. *Ibid.*
8. Mere lapse of time is not alone a bar to the opening of an executor's accounts; but long acquiescence in the settlement of an administration account, may make it against conscience to seek to open it. *Ibid.*
9. An administrator appointed in Kentucky, who has received in the District of Columbia, money belonging to the estate of his intestate, cannot, by a bill in equity, be compelled to account for and distribute the same to the next of kin, citizens of, and residing in Virginia, although the administrator should be found in the District of Columbia. *Vaughan v. Northop*, 496.
10. *Quære*, whether a foreign administrator can be sued as such, and held to account in the District of Columbia, for assets there received. *Ibid.*
11. Letters of administration with the will annexed, granted in the District of Columbia, while there was an executor acting under letters testamentary granted in Maryland are void. *Paul v. Kane*, 549.
12. If the executors, inadvertently, pay to some of the legatees more than their shares of the *residuum*, and to others of the legatees less than their shares, and the estate is not sufficient to make good the deficiency, the executors must suffer the loss, or look for reimbursement to the legatees who have been over paid. *Moffit v. Varden*, 658.

AGENT.

1. A promissory note, signed by A. B. as agent of an incorporated company, does not, upon the face of it, import a personal obligation; and it is not incumbent upon the defendant to show his authority to make such a note; nor the extent of his powers; nor that the money was applied to the use of the company; nor that he declared it to be for their use. The burden of proof in such case is upon the plaintiff. *Bradley v. McKee*, 298.
2. If, at the date of the note, or at the time it became payable, the company had ceased to do business as a company, the corporation was not thereby dissolved, nor the defendant thereby rendered personally responsible upon the note; and if, after the making of such note, the corporate property was sold by the company who ceased to do business as a corporation, and the stockholders made a distribution of the effects of the corporation, and apportioned the debts due by the company to be paid by such individual stockholders, the corporation did not thereby cease to exist, but was capable of being bound by such a note. *Ibid.*
3. If a note be given by a person *bonâ fide*, as agent of an incorporated manufacturing company, for a loan of money to the company, and the same was known to the person who discounted it, at the time of his discounting it, the agent is not personally liable upon the note. *Ibid.*
4. A sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be personally present. *Connolly v. Belt*, 405.
5. If an agent, whose duty it is to keep the goods and effects of his employer separate, mix them with his own, it lies with him to distinguish them; and if he cannot, the whole is to be considered as belonging to the other; and every sort of profit derived, by an agent, from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. *Yates et al. v. Arden*, 526.
6. See AUTHORITY. *Welch v. Hoover*, 444.

ALLEYS.

The purchaser of lots in the City of Washington by the square foot is not bound to pay for a proportion of the alleys, if there be no special agreement to that effect. *Brent v. Smith*, 672.

AMENDMENT.

1. The Court will, at a subsequent term, correct a judgment entered, by mistake, for too large a sum. *United States v. Pearson*, 95.
2. If the defendant has pleaded and also demurred to the whole declaration, the Court will permit him to withdraw the demurrer. *Suckley v. Slade*, 123.

AMENDMENT, (*Continued.*)

3. The marshal may amend his return of a *feri facias* according to the truth of the case; stating the sale, &c. from his sale's book. *Lintherum v. Remington*, 546.
4. With the leave of the Court, the plaintiff in ejectment may amend his declaration by a count upon a new demise; which count will be considered as the commencement of the suit, as to the title claimed under that new demise. *Wilkes v. Elliot*, 611.

ANSWER.

The answer of a defendant in chancery, who has no personal knowledge of the facts he states, and whose conscience cannot be affected thereby, is not evidence although responsive to the allegations of the bill. The only effects of such an answer is, to prevent an issue and put the plaintiff to the proof of his allegations. *Dutil v. Coursault*, 349.

APPEAL.

1. An appeal does not lie from a justice of the peace who has rendered judgment for \$5 only. *Owner v. Corporation of Washington*, 381.
2. Upon an appeal from the sentence of the Orphans' Court, sustaining a will, this Court has no jurisdiction to inquire into the validity of any particular legacy bequeathed by the will. *Newton v. Carbery*, 626.
3. If the appellant, from the judgment of a justice of the peace, die pending the appeal, and no further proceedings are had in the cause for two terms thereafter, the sureties in the appeal bond are not liable for the appellant's not having prosecuted his appeal with effect. *Jeffers v. Forrest*, 674.

APPRENTICE.

1. Minors may be enlisted in the marine corps, as musicians, with the consent of their fathers; and may be bound apprentices to the drum-major, in behalf of the United States. *Ex parte William Brown*, 554.
2. If a minor, aged nineteen years, enlists for a term of four years, *quære* whether he is not entitled to his discharge at the age of twenty-one. *Ibid.*

ARREST.

In an action for maliciously causing the plaintiff to be arrested, it is no defence that the defendant's oath did not, in law, authorize the magistrate to grant the warrant of the defendant, if the defendant availed himself of it, and delivered it to the constable to be executed; unless the oath and arrest were made ignorantly and without malice. *Johnson v. Dawes*, 283.

ARSON.

Arson is not a capital offence in the District of Columbia; therefore the defendant is not entitled to a peremptory challenge, in the county of Washington. *United States v. Henry White*, 73.

ASSAULT AND BATTERY.

1. An indictment for assault and battery at common-law, and an indictment under the statute for the same assault and battery, with intent to kill, may be pending and tried at the same time; and if the defendant be found guilty on both, the Attorney of the United States may enter a *nolle prosequi* as to either, and pray judgment on the other; but there cannot be judgment upon both. The pendency of another indictment against the defendant for the same offence, is no ground for arresting the judgment. *United States v. Negro James Herbert*, 87.
2. In an indictment under the statute for assault and battery, with intent to kill, it is not necessary to state the manner and extent of the assault and battery, nor the particular weapon used. It is only necessary to describe the assault and battery as at common law, with the addition of the words charging the intent to kill, in the terms required by the statute. It is not necessary to charge the assault to be felonious, nor malicious, nor to be with *malice prepense*; nor to state any other circumstance to show, that if death had ensued, it would have been murder. *Ibid.*
3. A former conviction cannot be pleaded in bar, unless it has been followed by judgment. *Ibid.*
4. If a man raise a club over the head of a woman within striking distance, and

ASSAULT AND BATTERY, (Continued.)

threaten to strike her if she opened her mouth, this is an assault in law. He had no right to impose such a condition. *United States v. Richardson*, 348.

5. Upon an indictment for assault and battery with intent to kill, it is not necessary to show that the crime would have been murder if death had ensued. *United States v. Tharp*, 390.

ATTACHMENT.

1. If a peremptory *mandamus* be superseded by a writ of error to the Supreme Court of the United States, who affirmed the judgment, and, by mandate, order such proceedings to be had as, according to right, and justice, and the laws of the United States, ought to be had; the Circuit Court will not issue an attachment against the defendant for contempt in not obeying the former peremptory *mandamus* which was superseded by the writ of error, but will issue an *alias* writ of peremptory *mandamus*. *United States v. Amos Kendall*, 385.
2. The Court will not issue an attachment upon a decree for the payment of money, but will leave the complainant to his remedy by *fieri facias* or *ca. sa*. *White v. Clarke et al.* 401.
3. An attachment, to answer in a plea of trespass on the case, founded upon a promissory note having a scrawl for a seal, will be quashed, and the plaintiff will not have leave to amend, nor to declare in debt. *Ten Broeck v. Pendleton*, 464.
4. A chancery attachment will not lie against the effects of a deceased person. *Henderson v. Henderson*, 469.
5. In an affidavit to obtain an attachment under the Act of Maryland, 1795, c. 56, it is not necessary to state the plaintiff to be a citizen of the county of Washington, D. C. *Decatur v. Young*, 502.
6. It is not necessary, in order to obtain an attachment under the Maryland Act of 1795, c. 56, that the instrument of writing produced to the magistrate, should upon its face show a complete cause of action; nor is it necessary that the affidavit should state the plaintiff to be a citizen of the United States. It is sufficient if the magistrate states that the plaintiff is a citizen of one of the States. *Hard v. Stone*, 503.
7. It is not sufficient ground for quashing the attachment, that the copy of the short note sent with the writ has, by mistake of the clerk, the word "cash," instead of the word "each." *Ibid.*
8. The Circuit Court of the District of Columbia, has jurisdiction of an attachment issued by warrant of a justice of the peace. *Ibid.*
9. An attachment under the Maryland Act, 1795, c. 56, is dissolved by the death of the principal debtor, and the appearance of his administrator. *Pancost v. Corporation of Washington*, 507.
10. When the judgment against the principal is for a larger sum than the real debt, to be released on payment of the real debt and interest until paid, upon which judgment an attachment is issued, by way of execution, under the Maryland Act of 1715, c. 40, § 8, and judgment of condemnation is rendered of the effects in the hands of the garnishee, and execution is issued thereupon; the marshal may levy the whole debt and interest up to the time of payment, if there are effects of the principal to that amount in the hands of the garnishee. *Allen v. Croghan*, 517.
11. A garnishee who received the goods of the defendant under a deed of trust, fraudulent in law as to some of the creditors, if he acted *bona fide*, is entitled to a reasonable compensation for his services in taking care of the goods and selling them, whoever may be entitled to the net proceeds. *Noyes v. Brent*, 551.
12. A mortgage of all of a man's stock in trade, and debts due to him, to secure payment of a debt already due and payable by him to the mortgagee on demand, is void as to creditors, unless the possession accompanied and followed the deed, although acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5. *Id.* 656.
13. If an attachment under the Maryland Act of 1795, c. 56, and a *capias ad respondendum* be both served, while the defendant is attending the court as a party in another cause, the attachment will be dissolved upon the arrest of the defend-

ATTACHMENT, (*Continued.*)

ant on the *capias*, and the defendant will be discharged from the arrest because privileged as a suitor in another cause. *McFerran & Duncan v. Wherry*, 677.

14. When a decree of this Court is affirmed by the Supreme Court of the United States, and a mandate is sent to this Court commanding that such proceedings be had in said cause "as according to right, and justice, and the laws of the United States ought to be had, the appeal notwithstanding," and this Court makes an order, that the defendants, without further delay perform the decree thus affirmed, with costs, this order is not such a judgment or decree as may be superseded under the Maryland Act of 1791, c. 67. *White v. Clarke et al.* 530.

ATTORNMENT.

See ACTION ON THE CASE. *Brown & ux v. Corcoran*, 610.

AUDITA QUERELA.

It seems that a purchaser of lands, bound by a judgment, may move to quash the execution upon its return, or may have an *audita querela*. *Jackson v. Bank of the United States*, 1.

AUTHORITY.

1. An agent is a competent witness to prove his own authority, if not in writing; and is not incompetent by reason of his liability to either of the parties. *Welch v. Hoover*, 444.
2. A parol authority will support a written contract. *Ibid.*
3. Under a power of attorney from several persons to sign a joint promissory note, the Attorney may make a joint and several promissory note; the purpose of the parties being to renew a joint and several note which had been discounted by the plaintiff. Or, if the power was defective, the note was only void to the extent to which the attorney exceeded his authority; that is, as a several note, but was valid as a joint note. *Bank of Metropolis v. Moore*, 518.

BAIL.

1. If it appear upon the whole record on an indictment for a misdemeanor, that the offence was committed more than two years before the indictment was found, the defendant may avail himself of that defence by a general demurrer. *United States v. Richard H. White*, 368.
2. A recognizance to appear in Court from day to day, to answer to a certain indictment, and not to depart without the leave of the Court, is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the Court to depart; and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment. *Ibid.*
3. A certificate, in the usual form, by the officers of the Treasury of the United States, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail. *United States v. W. S. Smith*, 484.
4. The affidavit to hold to bail, must show that the debt was due at the time of issuing the *capias*. *Hill v. Myers*, 484.
5. In actions on the case for uncertain damages, the Court will mitigate the bail according to circumstances. *Sanderson v. Serat*, 485.
6. In a question of bail, the Court will not take into consideration a set-off claimed by the defendant. *Robins et al. v. Upton*, 498.
7. In a suit upon protested bills of exchange, the Court will not require an affidavit of the amount due upon the bills, in order to hold the defendant to special bail. *Ibid.*
8. It seems to be no objection to bail, that he is indorser of the paper upon which the suit is brought. *Ibid.*
9. In an action upon the case for a libel, the damages were laid at \$20,000. and the plaintiff in his affidavit averred damages to the same amount. The Court required the bail to justify to the amount of \$500 only. *Mayo v. Smith et al.* 569.
10. The clerk of the House of Representatives of the United States, is not personally responsible for damages for refusing to give the public printing to a person to whom the preceding clerk had promised it; and therefore cannot be held to bail in an action upon the case founded on such refusal. *Davis v. Garland*, 570.

BAIL, (Continued.)

11. If the defendant has been discharged under the insolvent law of Maryland, the bail will be exonerated. *Clagett v. Ward*, 669.

BANK.

1. An indictment, under the 18th section of the charter of the late Bank of the United States, (April 10, 1816,) for uttering as true, a forged note of that bank, must aver that it was made "in imitation of, or purporting to be, a bill or note issued by order of the president, directors, and company of the said bank." But without such an averment, it may be a good indictment under the 11th section of the Penitentiary Act of the District of Columbia. *United States v. Noble*, 371.
2. Notwithstanding the expiration of the term for which the corporation was created, its corporate capacity continued to exist under the 21st section of the charter, for two years, for the final settlement and liquidation of its affairs, and during that period, the bank was liable to be injured by the forgery of its notes; and such forgery, committed within the two years, was properly averred in the indictment, to be "to the prejudice of the right of, and with intent to defraud the President, Directors, and Company of the Bank of the United States." *Ibid.*
3. Upon an indictment for uttering forged bank notes, evidence may be given on the part of the United States that a parcel of counterfeit checks and drafts on other banks, and others printed on bank-paper not filled up, were found in the defendant's possession. *Ibid.*
4. In an indictment under the Penitentiary Act, D. C., for stealing bank-notes, *Quere*, whether it is not necessary to state the name of the bank, and the date of the notes? *United States v. Negro Frank Pearl*, 392.
5. A written contract under the hands and seals of the President and Cashier of a bank, is admissible evidence in an action against the bank, without further evidence of the authority of the President and Cashier, to make the contract. *Gutschlick v. Bank of Metropolis*, 435.
6. The bank, to which an inland bill is transmitted for collection, through the intervention of another bank, becomes the agent of the payee, and answerable to him alone, for any breach of its duty in relation to the bill. *Farmer's Bank v. Owen*, 504.
7. If a bank discounts a note made payable directly to itself, and takes the interest in advance, for the time the note has to run, it is not usury; such being proved to be the usage of the banks. *Union Bank v. Corcoran*, 513.
8. The debts due to the late Bank of the United States, on the 3d of March, 1836, were not extinguished by the expiration of the term for which the corporation was created; and it had a right to use its corporate name, style, and capacity, for a further period of two years for the final settlement of its affairs. A note given after the 3d of March, 1836, to the plaintiff, (who was an agent of the Bank of the United States,) by way of renewal of a note due before that day, was not void, nor was it necessary to use the name, style, or capacity of the bank, to enable the plaintiff to recover upon such a note. *Smith v. Frye*, 515.
9. See **AUTHORITY**, 3. *Bank of Metropolis v. Moore*, 518.

BARGAIN AND SALE.

- A deed of bargain and sale, by a person not in possession, conveys no title. *Fraser et al. v. Hunter et al.*, 470.

BARON AND FEME.

1. If personal property be conveyed to a trustee "for the sole and separate use of a *feme covert*, her executors, administrators and assigns, free and clear from any control, or demand of the husband, or his creditors," with leave to lend the money with the approbation of the wife, for her "like sole and separate use;" money thus lent, and unpaid at the death of the wife, does not become the property of the husband; nor is he entitled thereto in equity; although, (standing in the place of administrator, under the Maryland law of 1798, ch. 101, c. 5, § 8,) he might recover it at law. *Dorsett v. Marshall*, 96.
2. When property is conveyed in trust for the sole and separate use of the wife, during the term of her life, and after the expiration of such term, for the use of such person or persons, and for such purposes, as she by her last will and testament,

BARON AND FEME, (Continued.)

- should appoint and direct, and in default of such appointment, to the use of her next of kin, and personal representatives. A court of equity cannot authorize the trustees to convey the property to the husband, upon a bill filed by him and his wife against the trustees, for that purpose. *Markoe and Wife v. Marcy et al.* 306.
3. An agreement by a *feme covert* to relinquish her dower in certain lands, and to mortgage to her husband's creditors, other lands held in trust to her separate use, is a sufficient consideration to prevent a post-nuptial deed of trust to her separate use, from being a voluntary conveyance; and the subsequent actual release of dower, &c., made it an adequate consideration. *Bank of the United States v. Lee et al.* 319.
 4. The joint possession of husband and wife, of property conveyed to her separate use, is no evidence of fraud. *Ibid.*
 5. A deed of conveyance of slaves in Virginia, for the separate use of the wife, loses nothing of its validity, by the removal of the parties to Washington, D. C. and it is not necessary that it should be there recorded. *Ibid.*
 6. A power, reserved in a deed of trust, to dispose of any part of the property with the consent of the trustee, and upon substituting an equivalent, is not evidence of fraud. *Ibid.*
 7. The subsequent conduct of the husband, in disposing of some of the slaves, without the consent of the trustees, and without substituting an equivalent, is not evidence that the deed was fraudulently made. *Ibid.*
 8. A deed of bargain and sale of her slaves, by a *feme sole*, to a trustee to her separate use, without any control of her husband, notwithstanding her future coverture is a bar to the marital right of the future husband, unless made without his privity and consent. But if made pending the treaty of marriage, without valuable consideration, and without the privity or knowledge of the husband, it is void as to him. *Prather v. Burgess*, 376.
 9. A husband who has conveyed all his estate to a trustee, for the sole and separate use of his wife, may join with her in an action of trespass *quare clausum fregit*, and in law would be entitled to the damages recovered; although in equity he might be considered as receiving them in trust for the separate use of his wife. *Fraser et al. v. Hunter et al.* 470.
 10. A *feme covert*, having a separate estate in the hands of her trustee, may contract debts, and bind her separate estate for the payment, and the Court will appoint a receiver, to collect the rents and profits. *Simms v. Scott*, 644.

BILLS AND NOTES.

1. A deposition taken in Louisiana before a person who calls himself, "a commissioner duly appointed by the District Court of the United States, for the Eastern District of Louisiana, under and by virtue of the Act of Congress, entitled "An Act for the more convenient taking of affidavits and bail, in civil causes, depending in the Courts of the United States," and inclosed and directed to the clerk of this Court, may be read in evidence to the jury without further authentication. *Whitney v. Hunt*, 120.
2. Extracts from the notarial book of a deceased notary in Louisiana, proved by a witness, who has the lawful possession of the book, and is authorized by the laws of Louisiana, to certify the same, may be given in evidence in this Court, to prove demand of payment of a promissory note, and notice to the indorser. *Ibid.*
3. The Court will leave it to the jury, to decide from the evidence where the indorser, the defendant, resided when the note fell due, and whether the post-office, to which the notice was sent, was the nearest post-office to the defendant's residence, and will instruct them, that if the notice was put into the post-office and directed to the defendant at the post-office nearest to his residence, it was sufficient notice, and that the holder had used due diligence in that respect. *Ibid.*
4. If new notes are taken by the holder of a note, and time given without the consent of the indorser upon the old note, he is discharged. *White v. Burns*, 123.
5. The maker of a note is a competent witness, not to prove its original invalidity, but the improper use afterwards made of it; and that time was given to him without the consent of the indorser. *Ibid.*
6. The jury cannot infer, that the plaintiff's agreed to run the risk of a note's being

BILLS AND NOTES, (*Continued.*)

- a forgery, because it was passed to them, long after it was dishonored, and at a discount of ten per cent. *Semmes v. Wilson*, 285.
7. A person who sells a note, is always understood as affirming that it is what it purports to be; that is, a genuine note. If it is not what it purports to be, it is nothing, and may be treated as a nullity; and it is not material whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered, or to be sold and delivered at a subsequent day. In the first case it would be no payment. In the second and third cases, there would be a total failure of the consideration; and the person who has parted with his property, in exchange for a consideration which has failed, may resort to his original cause of action. *Ibid.*
 8. To enable a plaintiff who has received from his debtor, a forged note in payment of a precedent debt, to recover upon his original cause of action, it is not necessary for the plaintiff to prove that the defendant knew that the note was forged, when he passed it to the plaintiff, or that he passed it fraudulently. It is only necessary for him to prove that the note was forged, and was passed to him by the defendant, for a valuable consideration, after it was dishonored. It is not necessary that the plaintiff should prove that he had instituted suits against the maker, and indorser of the note, and failed to recover in such suits. He has a right to establish the forgery in a suit directly against the party who passed the note to him. *Ibid.*
 9. If the innocent *bonâ fide* holder of a forged note, which he has received for a valuable consideration, passes it to another innocent person, *bonâ fide*, and for valuable consideration, without indorsing it, although not liable upon the note, he is liable for the amount he has received for it; provided the other party has not been guilty of such negligence, as would deprive the person from whom he received the note of his remedy against prior parties, and has given notice, and offered to return the forged paper in a reasonable time.
The person, who passes away a forged note, which has laid a long time dishonored in his hands, is not wholly free from blame in not having discovered the forgery; and on that ground may be held liable to refund, to the person to whom he passed it, the consideration he received. *Ibid.*
 10. An action at law will not lie by an indorsee against a remote indorser of a promissory note made and indorsed in Virginia, although made payable at the Northwest Bank of Virginia; by whose charter, notes "made negotiable" at that bank are put upon the footing of bills of exchange; and although it should be put in circulation as a negotiable instrument, and deposited in the bank for collection, before it became payable, and should be regularly protested, and regular notice given to the parties; an intermediate indorser of such a note is therefore a competent witness to invalidate the note. The rule, that a party to an instrument shall not be permitted to discredit it by his testimony, is applicable only to mercantile negotiable paper, which a promissory note, made and indorsed in Virginia, is not. *Bradley v. Knox et al.* 297.
 11. See AGENT, 1, 2, 3. *Bradley v. McKee*, 298.
 12. An indorser of a promissory note is a competent witness for the defendant, in an action by the indorsee against the maker. *Mason v. Masi*, 397.
 13. The first purchaser of several city lots having given his several notes, for each lot respectively, with the same indorser, and the lots having been resold for his default, some of the lots bringing more, and some less than the first contract price, it was held, that the indorser was entitled to the benefit of the surplus of one to make good the deficiency of the others. *Smith v. Arden*, 485.
 4. See BANK, 6. *Farmers Bank v. Owen*, 504.
 5. The defendant's note for \$7,400, made payable directly to the plaintiffs on demand with interest, but not payable to order, and upon which there is an indorsement stating that it is held by the plaintiffs as collateral security for the defendant's obligation upon a previous note of Thomas Corcoran, Senior, deceased, is not void under the statute of frauds, as being a promise to pay the debt of another without a consideration therein expressed. *Union Bank v. Corcoran*, 513.
 6. See AUTHORITY, 3. *Bank of Metropolis v. Moore*, 518.

BOND.

An increase of compensation allowed to a collector, without consulting his sureties, does not discharge them. *Smith v. Addison*, 623.

BY-LAW.

1. A keeper of a wood-yard in the city of Washington, is a retailer within the meaning of that clause in the charter which authorizes the corporation "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages," &c. *Corporation of Washington v. Casanave*, 500.
2. The Corporation of Washington, under the power to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, has a right to prohibit them to be out after ten o'clock, P. M. *Jennings v. Corporation of Washington*, 512.
3. The Corporation of Washington has power to make a by-law to prevent free colored persons from going at large through the city later than ten o'clock, P. M., without a pass, &c. *Nichols v. Burch et al.* 553.
4. The Corporation of Washington has power, under its charter, to prohibit ordinary-keepers to sell spirituous liquors to free colored persons. *Corporation of Washington v. Lasky*, 381.

CERTIORARI.

1. The Circuit Court of the District of Columbia has jurisdiction to issue a *certiorari* to a justice of the peace in a case of forcible entry and detainer; and in vacation the writ may be ordered by one of the judges. Bond and security must be given to answer for costs.

An inquisition describing the property as "one tenement or storehouse, with the appurtenances in the county aforesaid," is too vague and uncertain, and will be quashed. *Holmead v. Smith*, 343.

2. A *certiorari* does not lie to a justice of the peace, in a case of which he has jurisdiction. *Homans v. Moore*, 505.
3. A plaintiff may relinquish interest upon an open account, and bring his action for the principal sum only, before a justice of the peace, if the principal does not exceed \$50, although, with interest, the debt would exceed that sum. *Ibid.*

CHALLENGE.

A peremptory challenge is not allowed in arson. *United States v. Henry II. White*, 73.

CHANCELLOR OF MARYLAND.

1. On the 26th of October, 1801, after Congress had, by the Act of the 27th of February, 1801, exercised exclusive legislation over the District of Columbia, the Chancellor of Maryland had jurisdiction to decree a conveyance, by an infant, of lands in that district, in pursuance of a contract made by the ancestor of the infant; the suit for a specific performance having been commenced before Congress had exercised such exclusive legislation. *Bank of the United States v. Van Ness et al.* 294.
2. The Chancellor of Maryland, on the 26th of October, 1801, decreed that the infant, Marcia Burns, should, in a certain extent, by W. M. D., her guardian *ad litem*, convey to J. P. V., the purchaser, the property in question. Upon the happening of the event, a deed, purporting to be from the infant by her guardian, and concluding thus: "In witness whereof, the said Marcia," (the infant,) "by W. M. D., her guardian in this case, hath hereunto set her hand and seal, the day and year before mentioned;" was signed by the said W. M. D. "guardian of the said Marcia Burns," and sealed with his seal. The commissioner who took the acknowledgment, certified that the said W. M. D. acknowledged the instrument to be "his act and deed as guardian as aforesaid, and thereby the act and deed of the said Marcia." *Ibid.*, that this deed thus signed, sealed, delivered, acknowledged, and duly recorded, was a good and sufficient execution of the decree, and a good deed to pass the land to the purchaser; and that if it be not, yet, by the Act of Maryland, 1785, c. 72, § 14, the decree itself stands as a conveyance. *Ibid.*

CHESAPEAKE AND OHIO CANAL COMPANY.

The lots in the city of Washington, lying on Rock Creek, are entitled to the water privilege in front of them, although separated from them by a public street, unless the bank of the creek lies between the street and the creek; and

CHESAPEAKE AND OHIO CANAL COMPANY, (*Continued.*)

the owner of the lots is entitled to the condemnation-money awarded for the water privilege in front of them, condemned for the use of the Chesapeake and Ohio Canal Company. *Chesapeake and Ohio Canal Company v. Union Bank*, 509.

CITY LOTS.

See ALLEYS. *Brent v. Smith*, 672.

CITY SURVEYOR.

It is the duty of the city surveyor to attend, when requested, and examine the foundation for walls of any house to be erected, when the same shall be level with the street, or surface of the ground, for the purpose of adjusting the line of the front of such building to the line of the street, and correctly placing the party wall on the line of division between that and the adjoining lot, and his certificate is evidence and binding on the parties interested; but it is not necessary to the plaintiff's right of action for half the value of the wall, that it should have been so adjusted by the surveyor; or that the walls should be of the thickness required by the third article of the commissioner's regulations of the 20th of July, 1795. The value of half the wall may be recovered in an action upon the case in *assumpsit*. *Miller v. Elliot*, 543.

COMMON CARRIER.

If the consignee of property sent by a common carrier, demand and receive it before it reaches its ultimate destination, he is liable for the full freight. *Violet v. Stettinius*, 559.

CONFESSION.

The whole confession must be given in evidence, if any part is given, but the jury has a right to judge for themselves of the truth thereof, or of any part of it. *United States v. Negro Ralph Prior*, 37.

CONSIDERATION.

See BARON AND FEME, 3. *Bank of the United States v. Lee*, 319.

CONSTABLE.

A constable, having a warrant to arrest a man on a charge of forgery, seized and searched his trunk, and finding therein articles which he suspected were stolen, took them into his custody. *Held*, that they are not thereby in the custody of the law, but may be replevied. *Brent v. Beck*, 461.

CONTRACT.

1. See BANK, 5. *Guttschlick v. Bank of Metropolis*, 435.
2. The plaintiff cannot recover in an action of *indebitatus assumpsit*, for work and labor done under a contract under seal, unless the whole work has been done according to the contract; nor in an action against three defendants, upon a contract under the seal of one defendant only; unless the contract was made for the benefit of all the defendants, and the work performed according to the contract. *Fresh v. Gilson*, 533.
3. See BAIL, 10. *Davis v. Garland*, 570.
4. If a contract be absolute to deliver flour on or before a particular day, the vendor will not be excused by an obstruction to the navigation on the canal. It is not material whether the defendant had, or had not, the flour on hand at the time of the contract. *Dodge v. Van Lear*, 278.

CORPORATION.

The proceedings of a corporation aggregate, may be given in evidence against a party not a member of the corporation, although there should be no evidence that such notice of the meeting as the charter requires, had been given. *Bradley v. McKee*, 298.

CORPORATION OF ALEXANDRIA.

1. The Corporation of Alexandria has a right to collect taxes by distress and sale; and to raise taxes for purposes and works out of the town. *Beale v. Burchell*, 310.
2. The Court will not instruct the jury that the plaintiff has a right to recover; unless all the facts necessary to enable the plaintiff to recover, are stated in the prayer. *Ibid*.

CORPORATION OF GEORGETOWN.

The Corporation of Georgetown has power to rent fish-wharves. *Corporation of Georgetown v. Chew*, 508.

CORPORATION OF WASHINGTON.

1. The Corporation of Washington has no power to prohibit free colored persons from selling perfumery. *Carey v. Corporation of Washington*, 13.
2. The Corporation of Washington has power to require the registering of slaves brought in to hire or reside in the city; and to require an affidavit, &c. *Hill v. Corporation of Washington*, 114.
3. A deed from the Corporation of Washington upon a tax-sale, is void, unless the surplus of the proceeds of the sale, after deducting the taxes and expenses, was paid to the register of the corporation, or other person authorized by law to receive the same, with ten per cent. per annum, as interest thereon, computed from the expiration of two years from the day of sale, until the actual payment of such surplus, and the receiving of the deed from the corporation. *Rodbird v. Rodbird*, 125.
4. If, at the time of a tax-sale of a lot in Washington, there was personal property thereon, of sufficient value to pay the taxes, the sale is null and void. *Ibid.*
5. The Corporation of Washington has no right to require the keeper of a livery stable to take and pay for a license to keep the same; but if it be taken and paid for and enjoyed, the money paid for it cannot be recovered back. *Semble*, that money paid under an ignorance of the law, cannot be recovered. *Corporation of Washington v. Barber*, 157.
6. See BY-LAW, 4. *Corporation of Washington v. Lasky*, 381.
7. The Corporation of Washington has power to prohibit the granting of tavern licenses to colored persons. *Harriet Johnson v. Corporation of Washington*, 434.
8. The Corporation of Washington, under its authority to prevent nuisances, may prohibit the keeping of a dog in the city without a license, and may require money to be paid for the license. *Corporation of Washington v. Lynch*, 498.
9. A warrant is too vague and uncertain which charges that the defendant, "did on or about the 20th of July instant, own, harbor, or keep a female of the dog kind in Washington city, in the county aforesaid, without having a license therefor, contrary to the act or acts of the mayor, &c. on that subject made and provided." *Ibid.*
10. See BY-LAW, 1. *Corporation of Washington v. Casanave*, 500.
11. See BY-LAW, 2. *Jennings v. Corporation of Washington*, 512.
12. Infants, whose property has been sold for taxes, have a right to redeem at any time within one year after they have arrived at full age. *Mockbee v. Upperman et al.* 535.
13. It is a condition annexed to the title of every house lot in the city of Washington, that when the proprietor builds a partition wall between himself and his neighbor, he shall lay the foundation equally upon the land of both; and that any person who shall afterwards use the partition wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use. *Miller v. Elliot*, 543.
14. See BY-LAW, 3. *Negro Lloyd Nichols v. Burch et al.* 553.
15. The Corporation of Washington has power, under its charter, "to provide for licensing, taxing, and regulating," "vendors of lottery tickets," although the tax may be so high as to amount, in effect, to a prohibition; and to require the applicant for a license to deposit the license-money in bank, before the issuing of the license. *France v. Corporation of Washington*, 667.

COVENANT.

In covenant against two, if one plead infancy, and it be found for him, the plaintiff may enter a *nolle prosequi* against him, and have judgment against the other. *Kurtz v. Becker et al.* 671.

CUSTODY OF THE LAW.

See CONSTABLE. *Brent v. Beck*, 461.

DAMAGES.

1. In an action of trover for negroes, the plaintiff may give evidence of and recover damages beyond the value of the property converted. *Nevelt v. Berry*, 291.
2. If the vendor states, under his seal, that he has bargained, sold, and delivered the

DAMAGES, (Continued.)

- property to the vendee, the vendor, in an action of trover brought by the vendee for the property, is estopped to deny the delivery; and such an instrument is evidence of property in the vendee at the time of the conversion.
- If, after the conversion, the parties enter into a new contract respecting part of the property, which is thereupon delivered to the vendee, such new contract and delivery are not evidence of the performance of the first contract on the part of the vendor; nor of relinquishment of damages for such conversion, unless such vendee received such portion of the property as a compliance with the original contract, and intended thereby to relinquish his claim for damages for the previous conversion. *Ibid*.
3. If the property of a debtor be sold, under a deed of trust, to a greater amount than the debt, the surplus cannot be enjoined and stayed in the hands of the trustee to answer damages which the plaintiff may recover against the debtor at law, for not delivering up the possession of the property according to his agreement, unless the debtor be insolvent. *Connolly v. Belt et al.* 405.
 4. If the terms of a deed of trust be, that if the debt be not paid at the time appointed, the trustee shall sell the property, and it be sold accordingly, the sale will not be set aside because a sale of part of the property would have been sufficient to raise the money; especially if the property consist of a simple lot of ground, and there be subsequent incumbrancers who agree that the whole shall be sold. The trustee, in such a case, cannot sell a part only, without the consent of all parties concerned. *Ibid*.
 5. See AGENT, 4. *Ibid*.
 6. If, in replevin, upon the plea of property in the defendant, the jury find for the defendant, and assess his damages to the value of the goods replevied, the defendant may still maintain an action upon the replevin-bond, and recover damages beyond the value of the goods. *Hemstead v. Colburn*, 655.

DECEIT.

1. An action upon the case for deceit will not lie for a breach of promise. *Fenwick v. Grimes*, 439.
2. If the owner of a female slave sell her for less than the market price upon the purchaser's representation that he wished to have her for his own service, and that she should not be removed out of this district, nor sold to any person to be by him transported out of the district, and that she should live in the district near her friends; and the purchaser afterwards sell her to a negro-trader living in the district, by means whereof she is removed out of the district; it is no justification of the defendant, in an action for the deceit, that after he had purchased the slave, he was persuaded, by a friend, that she was unfit for his use, and that he ought to sell her; although the purchase was originally made in good faith. *Ibid*.
3. An action upon the case for deceit will not lie, unless there was a false affirmation of some fact; a non-performance of promises is not sufficient. The declaration must charge that the defendant averred some fact to be true; and that it was false. *Ibid*.
4. An action upon the case for deceit will lie against a person, who by false and fraudulent representations induces the plaintiff to sell his female slave for less than her value. *Id.* 603.

DECREE.

1. The Court will set aside a sale made under its decree, if not fairly made. *Bank of Alexandria v. Taylor*, 314.
2. See AGENT, 4. *Connolly v. Belt*, 405.
3. See DAMAGES, 3, 4. *Ibid*.
4. A sale made by a trustee under a decree of the Court, will not pass the title of land in the actual adverse possession of a third person at the time of the decree. *Carroll v. Dowson*, 514.

DEED.

1. See CORPORATION OF WASHINGTON, 3, 4. *Rodbird v. Rodbird*, 125.
2. See BARON AND FEME, 3. *Bank of United States v. Lee*, 319.
3. *Id.* 8. *Prather v. Burgess*, 376.
4. In 1823, the Commissioner of the Public Buildings had authority to take the acknowledgment of deeds of land in Washington county. *Middleton v. Sinclair*, 409.

DEED, (*Continued.*)

5. A purchaser under an execution against the grantor, has a right to show the deed to be fraudulent as to the creditor under whose execution he purchased. *Ibid.*
6. Although there be a variance in some respects in the description of the land in the two deeds, they may be given in evidence to the jury, who may decide the question of identity. *Ibid.*
7. A conveyance to his son by a father, of all his estate and effects, while indebted, and continuing in possession after the conveyance, is evidence of intent to delay, hinder, and defraud his creditors. *Ibid.*
8. The vendee of land cannot, after paying the purchase-money, recover it back upon the failure of the vendor to convey, unless the vendee has tendered to the vendor the form of a deed of conveyance to be executed by the vendor.
But if the vendor has not a good title at the time he is bound to convey, the vendee may recover back the purchase-money, without tendering the form of a conveyance, as he is not bound to accept a defective title. *Gutschlick v. Bank of Metropolis*, 435.
9. If the vendee receive an insufficient deed as a compliance with the vendor's contract to convey, and afterwards discovers that the title of the vendor was defective, and that the deed conveys nothing, the vendee, in an action against the vendor to recover back the purchase-money, may give in evidence the said deed, with other evidence showing the title to be defective, &c. *Ibid.*
10. If the vendor's title be defective, the vendee may recover back the purchase-money, in an action of assumpsit, although he has been in possession of the premises several years. *Ibid.*
11. A deed of personal property, to be void, if the grantor shall, on demand, pay a certain sum to the grantee, is void in law, as to the creditors of the grantor, unless the possession accompanied and followed the deed, although acknowledged and recorded agreeably to the Maryland Act of 1729, c. 8, § 5 and 6. *Smith v. Hunter*, 467.
12. A mortgage of all a man's stock in trade, and debts due to him, to secure payment of a debt already due and payable by him to the mortgagee on demand, is void as to creditors, unless the possession accompanied and followed the deed, although acknowledged and recorded according to the Maryland law of 1729, c. 8, § 5. *Noyes et al. v. W. L. Brent, Garnishee*, 656.

DELUSION.

1. The Court, in forming its opinion as to the soundness of mind of a testator, will look rather to the facts upon which the witnesses may have formed their opinions, than to the opinions themselves; but will form its opinion from the whole evidence consisting of facts and opinions. *Newton et al. v. Carbery*, 626.
2. The influence which will set aside a will, must be undue influence. The influence of the general doctrines of the church, of which the testator was a member, is not such undue influence; nor can the holding of such doctrines be adjudged to be such delusion as will vacate the will. The Court has no jurisdiction to decide whether a doctrine, held by any particular religious sect, be true or false. A delusion common to all the members of a religious sect, will not avoid the will. *Ibid.*
3. See APPEAL, 2. *Ibid.*

DEMURRER.

1. It is not universally true, that what would be fatal upon demurrer would be equally fatal in arrest of judgment. Upon demurrer, the Court decides upon the whole record, as it then appears; but upon a motion in arrest of judgment, the Court decides upon the whole record, as it then appears. There may be a *prima facie* cause of demurrer, which may be removed by the subsequent pleadings. *United States v. H. H. White*, 73.
2. See AMENDMENT, 2. *Suckley v. Slade*, 123.
3. If it appear, upon the whole record, upon an indictment for a misdemeanor, that the offence was committed more than two years before the indictment was found, the defendant may avail himself of that defence, by a general demurrer. *United States v. R. H. White*, 368.

DEPOSITION.

1. See BILLS AND NOTES, 1, 2, 3. *Whitney v. Hunt*, 120.

DEPOSITION, (*Continued.*)

2. A deposition cannot, under the Act of Congress, be taken before a judge of the City Court of the city of Lexington, in Kentucky. *Foreman v. Holmead*, 162.
3. A commission to take a deposition in a foreign country may issue for the plaintiff, *ex parte*, by order of the Court, or of a judge in vacation, if the opposite party does not file his cross-interrogatories within five days next after the rule-day, after the plaintiff shall have filed his interrogatories, provided his interrogatories shall have been filed ten days before the rule-day; and it is not necessary to give notice, to the opposite party, of the filing of the interrogatories; nor is it necessary that the party or the commissioner should give notice to the opposite party, of the time and place of taking the deposition, in a foreign country. But it must appear that the commissioner took the oath annexed to the commission. *Frévall v. Bache*, 463.
4. In taking a deposition under the Judiciary Act of 1789, the notice must be given by the magistrate before whom the deposition is to be taken; a notice given by the party is not sufficient. *Young v. Davidson*, 515.
5. By the leave of the Court, if no objection be made by the opposite counsel, a party may withdraw, from the files of the Court, a deposition, in order to get the magistrate to amend his certificate, according to the truth of the case; and such withdrawing and amending are not sufficient ground for rejecting the deposition. *Leatherberry v. Radcliffe*, 550.
6. If a deposition be taken *de bene esse*, because the witness is about to go out of the district, and to a greater distance than 100 miles from the place of trial, and he goes accordingly, it is not necessary that a subpoena should have issued to the marshal of this district, in order to enable the party to use the deposition; it is sufficient for him to prove to the satisfaction of the Court, that the witness, at the time of the trial, is gone to a greater distance, &c., although the witness may have been within the district, between the time of taking the deposition and the time of trial. *Ibid.*

DEVIATION.

In a voyage to Pernambuco, the vessel, when she arrived off Pernambuco, came to anchor off the port, when she might have gone directly in.

Held, that it was a deviation which discharged the underwriters. *West v. Columbian Ins. Co.* 309.

DEVISE.

1. The testatrix, having expressed an intention "to dispose of her worldly estate;" and having two grandsons, devised one-half of a lot of land to one of them and his heirs forever; and devised the other part of the lot, of the same size, to the other grandson, upon certain conditions which he complied with. The Court held that he took an estate in fee. *McCoun v. Lay*, 548.
2. A legacy to or for the use or support of a minister of the gospel, as such, or to or for the use or support of a religious sect, order, or denomination, is void by the bill of rights of Maryland. *Newton v. Carbery*, 632.
3. A devise to go in aid of a new Catholic church, then building in Georgetown, is void for uncertainty, as well as by the bill of rights. *Ibid.*
4. A charter granted to certain persons therein named, is to be presumed, *prima facie*, to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date. *Ibid.*

DISORDERLY HOUSE.

1. An indictment charging that the defendant kept "a certain unlawful, disorderly, and ill-governed house," "as a common tavern," "without license," "and kept a common tippling-house," and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drunk in and about the house at all times both at day and night, and on Sundays; and permitted certain idle and ill-disposed persons to assemble and continue drinking and tippling, to the common nuisance, &c., is a good indictment at common law, for keeping a disorderly house.

And evidence that the defendant kept an open house for selling spirituous liquors, and that such liquors were sold to other persons than boarders and lodgers;

DISORDERLY HOUSE, (*Continued.*)

and that the house was kept open, and such liquors there sold, on Sundays, and at late hours of the night; and persons intoxicated were seen in and coming out of the house drunk and disorderly, is sufficient to support the indictment. *United States v. Charles Columbus*, 304.

2. If a person hires a bar-room and fixtures, and occupies part of the house, and keeps his bar-room open on all days and at all hours, and on Sundays, and other days for the sale of spirituous liquors to other persons than boarders and lodgers, and allows such liquors to be drank in the said bar-room, at such days and times; the keeping of such a bar-room and house is a nuisance, and will support an indictment for keeping a disorderly house. *Quere?* *United States v. Benner*, 347.

DISTRESS.

1. A lease for twenty years, not acknowledged or recorded, is not a lease at will; and the landlord may distrain for rent, although the original lessee should not have been in possession for several years next before the distress; or should have died. The tenancy does not cease by the tenant's setting up an adverse claim more than six months before the distress. *Semmes v. McKnight*, 539.
2. A *bonâ fide* purchaser at a tax-sale without collusion with the tenant, may enter under his purchase, and convey to a third person, who will not thereby become tenant of the original landlord; but if there be collusion between the tenant and the purchaser to suffer the taxes, which it was the duty of the tenant to pay, to remain unpaid, and thereby to cause a sale by the collector of taxes, so as to enable the purchaser to buy in the property for the benefit of the tenant, the title of the property is not changed by such tax-sale, and the tenant remains tenant to the original landlord. *Ibid.*
3. The assessment and advertisement of property in a wrong name, does not make the tax-sale void, since the Act of May 26, 1824. *Ibid.*
4. If an improvement extend over divers lots, personal property found on any of those lots is liable for the taxes on all the lots so improved. *Ibid.*
5. Under a reservation of twenty dollars rent, "clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent; although there be a clause of reëtry for the non-payment of the rent. *Ibid.*
6. If the marshal take the goods of a tenant in execution, and before he removes them, the landlord distrain them for rent; and the marshal then remove them from the premises without paying a year's rent to the landlord who then replevies them, the Court will, on motion of the defendant, at the return of the writ, order the goods to be returned to the defendant, upon his giving a sufficient bond to return them, &c.

The return, in such case, is a matter of course, unless the Court should be satisfied that the defendant obtained possession of the property by force or fraud; or that the possession being first in the plaintiff, was got or retained by the defendant without proper authority or right derived from the plaintiff. *Remington v. Linthicum*, 345.

DISTRIBUTION.

1. See ADMINISTRATION, 12. *Moffit v. Varden*, 658.
2. If property be devised to the children of A. B., to be divided among them when they arrive at the age of maturity, the established rule of construction is, that all the children then living (that is, when the eldest shall have arrived at the age of twenty-one,) shall come in for their share, whether born before or after the death of the testator. The shares of those who have died in the mean time, will have lapsed into the general residuum to be divided among the survivors; and the children born in the mean time become entitled to their equal shares with the other children. If one die, after the eldest arrived at the age of twenty-one, and before actual distribution, his share goes to his next of kin, and does not lapse into the residuum. *Ibid.*
3. When the devise is directly to the children of the testator's brother and sister, the devisees take *per capita*, and not *per stirpes*. *Ibid.*

DOG.

1. See CORPORATION OF WASHINGTON, 8, 9. *Corporation of Washington v. Lynch*, 498.

DOG, (*Continued.*)

2. It is an indictable offence at common law to incite, provoke, and encourage a fierce and dangerous dog to bite and tear a cow. *United States v. McDuell*, 391.
3. *Quære*, whether in an indictment for keeping a large dog of a fierce and furious nature, and suffering him to go at large in and about the public streets, &c., to the great terror of the people and common nuisance, it is necessary to allege a *scienter*? *Ibid.*

DOWER.

See BARON AND FEME, 3. *Bank of the United States v. Lee*, 319.

DURESS.

See ADMINISTRATION, 1. *Foy v. Talburt*, 124.

EJECTMENT.

1. In ejectment, the death of the plaintiff's lessor cannot be taken advantage of, upon the general issue. *Worthington v. Etcheson*, 302.
2. To show possession in the lessor of the plaintiff, who was a purchaser at a sale under a decree of foreclosure, it is sufficient to show that the mortgagor was in possession until his death; and a lease for life made by the mortgagor is evidence of his possession, although the lease was not recorded. *Ibid.*
3. When the defendant is a disseizor and intruder, he is not entitled to notice to quit. *Ibid.*
4. If tenant for his own life die, and his heir enter, he is a disseizor and intruder. *Ibid.*
5. If the vendee of land who has paid part of the purchase-money, enters into possession, and fails to pay the residue according to the contract of sale, although demanded, the vendor cannot maintain ejectment against him without a notice to quit, or a notice that the contract is rescinded, or a demand of payment and notice of rescinding. *Costigan v. Wood*, 507.
6. See AMENDMENT, 4. *Wilkes v. Elliot*, 611.
7. If no adversary possession be shown, a plaintiff in ejectment may recover, without showing possession, or a right of possession, or an entry, or a right of entry, in his lessor within twenty years. *Ibid.*
8. A parol declaration, by the lessor of the plaintiff, that he had not authorized the suit, is not competent to show the title to be out of the lessor of the plaintiff. *Ibid.*
9. The defendant's possession for twenty years is no bar in ejectment, unless the defendant or the person under whom he claims, entered originally under color or claim of title; or unless, being in possession, he set up a color or claim of title hostile to that of the lessor of the plaintiff, more than twenty years before the commencement of the suit, and continued in possession ever since.
But if the defendant, or the person under whom he claims, entered upon and inclosed the premises more than twenty years before the commencement of the suit, without any recognition of the title of the lessor of the plaintiff, but claiming them as his own, and continued to occupy them until suit brought, the jury may infer that the possession was adverse, and if so, the plaintiff cannot recover. *Ibid.*
10. A person who holds a bare possession of a lot in Washington, without evidence of any *bond fide* title in fee, in law or in equity, (such possession being either adverse or tortious as to the legal title and estate of the lessor of the plaintiff, or subordinate to such title and estate,) cannot protect his possession, after paying previous taxes, by clothing it with the legal title obtained by refusing to pay subsequent taxes with intent to purchase the lot at the tax-sale. *Ibid.*
11. If the party who calls for an account-book in the possession of the other party, examine it, he makes it evidence for such other party. *Ibid.*
12. A purchase at a tax-sale, and inclosed possession under it, give color of title. *Ibid.*

EMANCIPATION.

No implied emancipation arises from a legacy of twenty-five dollars, bequeathed to slaves, who are ordered by the will to be sold. *Negro Bacchus Bell v. McCormick*, 398.

ENLISTMENT.

See APPRENTICE, 1, 2. *Ex parte Browne*, 554.

EQUITY.

1. When a party is obliged to ask the aid of a court of equity to enforce his legal rights, the Court will compel him to do equity, and will only grant him relief to the extent of his equitable rights. *Ridgway v. Hays et al.* 23.
2. The consignee, to whose possession the property has not come, (it having been seized by a foreign government,) has no right in equity to detain the whole sum awarded, as indemnity under the French Treaty of July 4, 1831, nor to enjoin in the Treasury of the United States more than his expenses and commissions. *Ibid.*
3. The commissioners, under the French Treaty of 1831, had no power to decide ultimately between two or more conflicting American claimants. *Ibid.*
4. If the property seized belonged to a firm, one member of which was not a citizen of the United States, his share of the loss could not be allowed as a claim under that treaty; yet he would be entitled to receive, out of the sum awarded to the other members, what he had paid for freight, and for moneys advanced. *Ibid.*
5. The decision of the commissioners is conclusive, as to the question whether the claim was valid against the French Government, under the treaty, but not as to the question whether it was good against the indemnity awarded. *Ibid.*
6. The commissions of the consignee are not chargeable to the French Government, under the treaty; they are a charge against the indemnity only, as they would have been against the proceeds if the property had not been seized by the French Government, and had been sold by the consignee. *Ibid.*
7. The consignees had a right to make reclamations on the government of France, and were justly entitled to reasonable compensation for their trouble and expenses. *Ibid.*
8. Where the United States are mere trustees of a fund for the benefit of individuals, it seems that it may be enjoined and stayed in the Treasury. *Ibid.*
9. A decree that one has a specific lien on a lot for the amount expended in improving it, under the expectation of obtaining a title, authorizes him to come upon the insolvent estate of the owner of the lot, as a general creditor, for the balance of the money thus expended, after crediting the proceeds of the sale of the lot. *Thompson v. King*, 93.
10. See BARON AND FEME, 1. *Dorsett v. Marshall*, 96.
11. Courts of equity have jurisdiction to decree the surrender of negotiable notes, unconscientiously withheld by the defendant. *White v. Clark & Briscoe*, 102.
12. If goods be sold at an abatement of five per cent. from the invoice price, upon the vendee's assurance that the notes given by him therefor should be punctually paid, and he suffers one of them to be protested, and the vendor afterward receives goods for his claim at seventy per cent.; the seventy per cent. is to be calculated upon the amount due upon the notes, and not upon the full invoice price. *Ibid.*
13. The rule, that if a debtor, in compounding with his creditors, secretly promises to give to one more than to the others, in order to induce him to sign the instrument of composition, it is void, only applies to cases where the creditors are supposed mutually to agree with each other, as well as with the debtor. But when each creditor is separately compounded with, this principle of mutuality and equality does not apply. Each creditor has a right to make his own bargain with his debtor; and one bargain cannot be void because it is better than another. *Ibid.*
14. A fraud in another transaction between the complainant and others, not parties in the cause, cannot invalidate the transaction between the parties to the suit before the court. *Ibid.*
15. The equity of redemption of a leasehold estate cannot be seized and sold under a *feri facias*. *Van Ness v. Hyatt et al.* 127.
16. See BARON AND FEME, 2. *Markoe v. Maxcy*, 306.
17. The Court will set aside a sale made under its decree, if not fairly made. *Bank of Alexandria v. Taylor*, 314.
18. See ANSWER. *Dutilh v. Coursault*, 349.
19. The commissioners under the French Convention of July 4, 1831, were authorized to make their award in favor of the person who was the legal and ostensi-

EQUITY, (*Continued.*)

ble owner of the property seized, at the time of the seizure; and were not bound to ascertain the rights and decide the litigations between conflicting claimants, citizens of the United States. They might select that one whom they deemed best entitled, and award to him the portion of the indemnity applicable to the claim, and leave the others to settle their disputes before the ordinary tribunals of the country, adjudicating according to the municipal laws of the land; it is, therefore, unimportant whether any other citizen of the United States could or could not support an original claim to a part of the indemnity allowed; and no citizen of the United States could, by any judgment of the commissioners, be deprived of his right to resort to the ordinary tribunals of the country, to establish his claim to participate in the sum awarded for the whole loss. *Ibid.*

20. It is no objection to the intervening claim of a third person, to a part of the fund awarded, that the original claimant, in making the oath required by the commissioners, as a condition of receiving the claim, swore falsely, but not fraudulently, the third person not participating in the oath, nor in the motive of the person who made it.

Quære, whether the commissioners had authority to require such a preliminary oath? *Ibid.*

21. In a contest between two litigants, respecting a sum awarded by the commissioners, it is not necessary to make all the other claimants under the convention, parties to the suit. *Ibid.*
22. The party who receives the sum awarded for the whole claim, is a trustee for such as may be entitled to participate therein. *Ibid.*
23. If a second incumbrancer take up a prior incumbrance, which was also a lien upon other property than that bound by the second incumbrance, the second incumbrancer may resort to property bound by the first incumbrance, and enforce his lien upon it. *Peter v. Smith et al.* 383.
24. See ATTACHMENT, 2. *White v. Clark & Briscoe*, 401.
25. When a decree for the surrender of certain promissory notes and the payment of a certain sum of money, is affirmed by the Supreme Court of the United States, with costs and damages, at the rate of six per cent. per annum, and the cause is remanded to the Circuit Court by mandate, commanding that court, "that such execution and proceedings be had in the said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding," and the Court thereupon orders the defendant, without further delay, to bring the notes into court to be cancelled, and the sum mentioned in the decree with interest thereon, and the costs of this suit, and the costs in the Supreme Court, to be paid to the complainant, the defendants cannot supersede this order by confessing a judgment out of court under the Maryland Act of 1791, c. 67, § 1, more than two months having elapsed since the original decree was rendered. *Ibid.*
26. Advances, to a master of a ship seized and carried into France in 1810, and liberated after eighteen months' detention, made after her release, to enable her to prosecute her homeward voyage, are not a lien upon the compensation awarded to the administrator of the owner by the commissioners under the French Convention. The plaintiff must resort to the administrator of the owner for payment, in the ordinary course of administration; especially if the person making the advances, takes bills of exchange for the amount advanced. *Mason v. Cutts*, 465.
27. See BILLS AND NOTES, 13. *Smith v. Arden*, 485.
28. A sub-purchaser, who gets in the paramount title, is bound in equity to fulfil his contract with the first purchaser, deducting what he has been obliged to pay to get in the title. *Ibid.*
29. See ADMINISTRATION, 9, 10. *Vaughan v. Northop*, 496.
30. A purchaser at a trustee's sale, for money payable by instalments with interest from the day of sale and with leave to take immediate possession, is bound to pay interest from that day, although he should decline to take possession until some months thereafter, while investigating the title, and waiting for the vendor to clear it; but is entitled to the rents and profits accruing during the same time. *Markoe v. Coze*, 537.
31. If the purchaser pays the money into court, by order of the judge granting the

EQUITY, (*Continued.*)

- injunction to stay a re-sale by the trustee, the interest ceases from the time of such payments. *Ibid.*
32. A court of equity will not lend its aid to enforce a judgment at law, obtained upon a prize ticket in a lottery drawn, by mistake, in a place not authorized by law. *Smith v. Chesapeake and Ohio Canal Company*, 563.
 33. Exceptions to an answer for insufficiency may be filed after exceptions for imper-
tinance. *Patriotic Bank v. Bank of Washington*, 602.
 34. A bill in equity, filed without being signed by the plaintiff or his counsel, will
be ordered to be taken off the files, because it cannot be received under the
16th rule of this Court.
When taken off, it may be signed by counsel, and be made the ground of a new
injunction. *Roach v. Hulings*, 637.
 35. If a judgment at law has been obtained by surprise, or without the knowledge
of the defendant or his counsel, in a case in which the defendant had taken a
bill of exceptions, and intended to prosecute a writ of error to the Supreme
Court of the United States, and to obtain a *supersedeas*, this Court will, upon a
proper appeal-bond, and injunction-bond, being given, stay the execution, by
injunction. *Ibid.*
 36. In suits in equity, in the Circuit Court, District of Columbia, depositions taken
under the Act of Congress of 1789, cannot be read in evidence. *Walker v.*
Parker, 639.
 37. If, upon the return of depositions, the opposite party except "to the caption as
well as to the substance of them," he may, at the hearing, even after the lapse
of several years, specify his objections, and insist upon them. *Ibid.*
 38. If, upon cross-examination of a witness in taking his deposition, he appears to
be interested, and therefore incompetent, the objection to his competency
is not waived by pursuing the cross-examination upon the merits of the case.
Ibid.
 39. Executors who are parties in the cause, cannot be examined as witnesses without
an order of the Court to examine them, and such an order will not be given, if
they are interested in the event of the cause. *Ibid.*
 40. A *feme covert*, having a separate estate in the hands of her trustee, may contract
debts, and bind her separate estate for the payment; and the Court will appoint
a receiver to collect the rents and profits. *Simms v. Scott*, 644.
 41. See ADMINISTRATION, 12. *Moffit v. Varden*, 658.
 42. See DISTRIBUTION, 2. *Ibid.*
 43. When lands of a deceased debtor are sold for payment of his debts, under a
decree founded upon the Maryland Act of 1785, c. 72, § 5, the heirs at law are
entitled to the rents and profits, until the day of sale; and if the decree, and the
proceedings under it, including the sale, be set aside upon a bill of review, and
a decree of restitution be obtained while the heirs are infants, they may jointly
maintain a bill in equity against the purchaser, or other party who has received
the rents and profits; and are not obliged to sue for them separately at law.
They have a right to an account and discovery. *Ritchie v. The Bank of the*
United States, 605.
 44. See AGENT, 5. *Yates et al. v. Arden*, 526.
 45. If the bill be originally filed by the complainants, "for themselves and such
other creditors as shall choose to come in and contribute to the expenses of
the suit;" the complainants before answer, have a right to amend their bill by
striking out those words, although some of the other creditors shall have filed
their petitions to be let in as complainants, but the complainants must pay the
petitioners their costs. *Ibid.*

ESCAPE.

The marshal is not, in an action upon his bond, liable for the escape of a person
taken, and in his custody on *ca. sa.*, for fines, &c. whether prayed in commit-
ment in execution or not. *United States v. Williams*, 619.

ESTOPPEL.

1. See DAMAGES, 2. *Nevett v. Berry*, 291.
2. An assignor of a bond is not estopped to deny its validity in law. *Moncure et al.*
Dermott, 445.

EVIDENCE.

1. See **CONFESSION**. *United States v. Negro Ralph Prior*, 37.
2. The Court, at the suggestion of either party, will order some of the witnesses to be taken out of court, and kept by the marshal while other witnesses are under examination; but will not order them to be kept apart from each other. *United States v. Richard H. White*, 38.
3. When a witness is objected to on the ground of his disbelief of a God, and of a future state of rewards and punishments, he is not to be examined on oath respecting his religious sentiments; but will be permitted to explain them; and if he then declares that he believes in a future state of existence, and in a Supreme Being, who will punish him, either in this world or the next, for his evil deeds; and if it appear in evidence that he has so declared before the trial; and that he sent his children to the Sunday school, and his wife and children regularly to church, the Court will permit him to be examined as a witness, leaving his credibility to the jury. *Ibid.*
4. The Court will not permit the declarations of another defendant charged separately for the same offence, to be given in evidence against this defendant, such declarations having been made after the supposed accomplishment of the common purpose. *Ibid.*
5. If a witness be cross-examined upon a collateral matter, evidence will not be admitted to disprove that matter, in order to discredit the witness. *Ibid.*
6. The only question as to the character of a witness, proper to be asked is, "are you acquainted with the general reputation of the witness as to veracity? and from your knowledge of that general reputation, would you believe him upon his oath?"
Evidence of the general bad character of the witness will not be permitted to be given to impeach his credibility. *Ibid.*
7. Upon an indictment for burning the Treasury Building of the United States, the prosecutor was not permitted to prove that another person than the defendant confessed that he burnt it, in order thus to prove that the fire was not accidental. *United States v. H. White*, 73.
8. A party, in cross-examining a witness, has not a right to ask him any question tending to degrade him unless it be in relation to a fact in issue in the record. *Ibid.*
9. Limitation may be given in evidence upon the general issue in a criminal cause; and the United States may give evidence that the defendant fled from justice, and therefore was not entitled to the benefit of the limitation. *Ibid.*
10. After a general verdict, the Court is bound to presume that the parties respectively availed themselves of their rights, and that every thing was alleged and proved which they had a right to allege and prove under that issue.
The Court, upon a motion in arrest of judgment, is bound to presume that every thing which was necessary to support the verdict, and which could be proved under the issue, was proved to the satisfaction of the jury. *Ibid.*
11. Upon trial of the general issue, the United States may give evidence to show that the defendant fled from justice, although that fact should not be alleged in the indictment, and although it should appear upon the record that the offence was committed more than two years before the indictment was found. *United States v. Richard H. White*, 116.
12. See **BILLS AND NOTES**, 1, 2, 3. *Whitney v. Hunt*, 120.
13. *Id.* 6, 7, 8, 9. *Semmes v. Wilson*, 285.
14. See **DAMAGES**, 1, 2. *Nevett v. Berry*, 291.
15. See **AGENT**, 1. *Bradley v. McKey*, 298.
16. See **EJECTMENT**, 1, 2, 3. *Worthington v. Etcheson*, 302.
17. See **DISORDERLY HOUSE**, 1. *United States v. Charles Columbus*, 304.
18. The receipt, by the lessor, of rent, from an under tenant, of part of the premises, is no evidence of the lessor's consent to the lessee's abandonment. *Slacum v. Brown*, 315.
19. See **ANSWER**. *Dutilh v. Coursault*, 349.
20. The intermarriage, and the acknowledgment of the child by the husband, are *prima facie* evidence that he was the actual father of the child; and if he begot the child, it was not perjury in the witness to swear that the child was the legitimate heir and only child left by the deceased husband. *United States v. Skam*, 367.

EVIDENCE, (*Continued.*)

21. See *BANK*, 3. *United States v. Noble*, 371.
22. The criterion by which to decide whether two suits are for the same cause of action, is, whether the evidence properly admissible in one will support the other. *Steam-Packet Company v. Bradley*, 393.
23. Parol evidence of the object and intention of a party in entering into a written agreement, and of the circumstances which induced him to make the contract, is not admissible, if there be no ambiguity in the written contract. *Ibid.*
24. See *DEED*, 4, 5, 6, 7. *Middleton v. Sinclair*, 409.
25. See *BANK*, 5. *Guttschlick v. Bank of Metropolis*, 435.
26. If the defendant read a part of the plaintiff's account in evidence, he makes the whole account evidence for the plaintiff. *Griffin v. Jeffers*, 444.
27. The Court will not permit questions to be put to a witness, tending to disgrace him, and which he is not bound to answer. *United States v. Richard H. White*, 457.
28. What a deceased witness testified at a former trial of the same cause may be substantially proved. It is not necessary to prove the very words of the deceased witness. *Ibid.*
29. The Court will not permit a witness who was a juror at a former trial of the same cause, to testify what was said by witnesses at that trial, in relation to the general reputation of a witness as to veracity. *Ibid.*
30. What a witness testified at a former trial may be given in evidence to discredit him, by showing a contradiction between that and his present testimony, without having first asked the witness whether he did not testify to that effect. *Ibid.*
31. When the question is upon a disputed boundary line, the Court will not permit hearsay evidence to be given that a particular object, (such as a spring,) was on the land of one of the parties. *Fraser et al. v. Hunter et al.* 470.
32. The plaintiff must prove every abuttal set forth in his declaration. Boundaries may be proved by hearsay. *Ibid.*
33. Evidence that the landlord was indebted to the defendant, (who was the tenant's surety in the replevin-bond,) at the time that the rent became due by the tenant, cannot be given under a plea of set-off. *Lenox v. Gorman*, 531.
34. See *CITY SURVEYOR*. *Miller v. Elliot*, 543.
35. The marshal's sales-book is evidence of the sale. *Linthicum v. Remington*, 546.
36. The plaintiff having offered in evidence a deed to the defendant to show that both parties claimed under the same title, and at the same time stating that he intended to show that the deed was fraudulent and void as to the plaintiff, is not thereby precluded from proving the fraud. *Ibid.*
37. When evidence has been given on both sides, the Court will not instruct the jury that the plaintiff cannot recover upon the evidence offered on his part. *Ibid.*
38. The Court will not permit counsel to testify as to facts disclosed by his client upon an application to him, as a conveyancer, to draw a deed. *Ibid.*
39. The grantee of a deed alleged to be fraudulent, is a competent witness in support of the deed, in an action against the person to whom he has conveyed the property, upon receiving from him a release, &c. *Ibid.*
40. It is error in a judge to instruct the jury that the evidence is sufficient to convict the defendant. The sufficiency is to be decided by the jury. *United States v. Fenwick*, 562.
41. See *EJECTMENT*, 7, 8, 9, 10, 11, 12. *Wilkes v. Elliot*, 611.
42. See *DEVISE*, 4. *Newton v. Carbery*, 632.
43. See *EQUITY*, 36, 37, 38, 39. *Walker v. Parker*, 639.
44. It is not sufficient for a jury, in any case, to find testimony; they must not only believe the testimony, but must find the facts which the testimony is produced to prove. The jury ought not to find the defendants guilty, unless they find all the facts necessary to constitute the offence charged. *Harriet Jones & Letty Clarke v. United States*, 647.
45. If the jury find the false pretences and the subsequent purchase, they may infer that the purchase was made upon the faith of the false pretences. *Ibid.*
46. The defendant's confession that she was free is competent evidence, against her, of that fact. *Ibid.*
47. A person, who has not been heard of for more than seven years, is presumed to have died at the end of the seven years. *Moffit v. Vardon*, 658.
48. A will not admitted to probate, is not admissible evidence in favor of petitioners for freedom. *Negro Ann Bell v. Greenfield*, 669.

EXECUTIVE OFFICERS.

1. The Circuit Court of the District of Columbia has authority to issue a *mandamus* to an officer of the United States, commanding him to perform a ministerial duty required by an act of Congress, in which the right of an individual is concerned, if that right is clear, and he has no other legal specific remedy. *United States, at the relation of Stokes et al. v. Amos Kendall, Post-master-General*, 163.
2. The Court, upon a proper affidavit, will grant a rule to show cause why a *mandamus nisi* should not issue. *Ibid.*
3. If a rule be laid upon a party to show cause why a *mandamus* should not issue, the Court cannot judicially take notice of a letter addressed by the party to one of the judges, stating reasons for declining to appear in Court to show cause, &c, and inclosing an opinion of the Attorney-General that the Court has not jurisdiction to issue the writ. *Ibid.*
4. The party to whom a *mandamus* is directed, cannot be permitted to appear without returning the writ. *Ibid.*
5. The executive officers of the United States, are personally liable at law for damages in the ordinary forms of action for illegal official, ministerial acts or omissions, to the injury of an individual. *Ibid.*
6. It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus*, is to be determined. *Ibid.*
7. The Post-master-General, in the discharge of those duties which are prescribed by law, is not lawfully subject to the control of the President. The President's power of controlling an officer in the exercise of his official functions is limited to those functions which are by law to be exercised according to the will of the President, and where the order of the President would be a justification in law. *Ibid.*
8. A writ of *mandamus* is as much a means given to the executive to enable him to cause the laws to be faithfully executed, as a common *capias ad respondendum*, or a *feri facias*, or any other writ devised by the judicial power, is, to enable him to discharge that duty. *Ibid.*

EXECUTION.

1. See EQUITY, 15. *Van Ness v. Hyatt et al.* 127.
2. A judgment of a justice of the peace cannot be seized and sold under a *feri facias* issued by a justice of the peace. *Bowen et al. v. Howard et al.* 308.
3. See DISTRESS, 6. *Remington v. Linthicum*, 345.
4. An action will not lie upon the official bond of the Marshal of the District of Columbia for not returning an execution, unless he has been required by rule of Court to return it, and has failed so to do. *United States v. Williams*, 400.
5. See ATTACHMENT, 2. *White v. Clarke et al.* 401.
6. See EQUITY, 25. *Ibid.*
7. If the vendee of goods on credit, upon receiving possession of them, agree in writing that they shall remain the property of the vendors until the purchase-money is paid, the vendors may, before payment, maintain replevin for them as their property, against the marshal who has seized them under an execution against the vendee. *Gaylor et al. v. Dyer*, 461.
8. See ATTACHMENT, 10. *Allen v. Croghan*, 517.
9. A *fi. fa.* binds the goods only from the time of its delivery to the marshal, and if it be returned without being levied upon the goods, its lien ceases; and a subsequent *fi. fa.* issued at the suit of another creditor upon a subsequent judgment, and levied upon the goods, must be satisfied before a second *fi. fa.* issued afterward by the first creditor upon the prior judgment.
The execution first delivered to the marshal must be first served. *Cunningham v. Offutt*, 524.
10. See AMENDMENT, 3. *Linthicum v. Remington*, 546.
11. See EVIDENCE, 35, 36, 37, 38, 39. *Ibid.*
12. See ESCAPE. *United States v. Williams*, 619.

FALSE PRETENCES.

1. It is not larceny in A to receive goods under a false pretence, and appropriate them to his own use. *United States v. Robertson*, 38.
2. See EVIDENCE, 44, 45, 46. *Harriet Jones et al. v. United States*, 647.

FALSE PRETENCES, (*Continued.*)

3. No person is guilty under the clause of the act respecting false pretences, unless he has obtained something by his false pretence. *Ibid.*

FORCIBLE ENTRY AND DETAINER.

See **CERTIORARI**, 1. *Holmead v. Smith*, 343.

FORGERY.

1. See **BILLS AND NOTES**, 6, 7, 8, 9. *Semmes v. Wilson*, 285.
2. See **BANK**, 1, 2, 3. *United States v. Noble*, 371.

FRAUD.

1. A written memorandum made by the plaintiff in his day-book, not signed by either of the parties, or by any person for either of them, and proved by oral testimony only, to have been made in the presence and with the consent of the defendant, and corroborated by the defendant's letters, not, however, referring particularly to that memorandum, nor stating the terms or consideration of the contract, is sufficient to take the case out of the 17th section of the statute of frauds; and it is competent for the jury to connect the letters with the written entry; and the same taken together, constitute legal and valid evidence of a written contract, in conformity with the requisition of the statute of frauds. *Dodge v. Van Lear*, 278.
2. See **BARON AND FEME**, 3, 4, 5, 6, 7. *Bank of the United States v. Lee*, 319.
3. *Id.* 8. *Prather v. Burgess*, 376.
4. See **DEED**, 4, 5, 6, 7. *Middleton v. Sinclair*, 409.
5. *Id.* 13. *Smith v. Hunter*, 467.
6. See **BILLS AND NOTES**, 15. *Union Bank v. Corcoran*, 513.
7. See **EVIDENCE**, 36. *Linthicum v. Remington*, 546.
8. See **ATTACHMENT**, 11. *Noyes v. Brent*, 551.
9. See **EVIDENCE**, 44, 45, 46. *Harriet Jones et al. v. United States*, 647.
10. See **DEED**, 14. *Noyes v. Brent*, 656.
11. If a third person receive money from the debtor, to pay the debt, and in consideration thereof, promise the creditor to pay it, he is liable to the creditor in an action for money had and received; and the case is not within the statute of frauds, although there be no note nor memorandum in writing to charge the defendant. *Goddard v. Mockbee*, 666.

FREEDOM.

1. A certificate of freedom is not such a pass as is contemplated by the 19th section of the Maryland Act of 1796, c. 67. *United States v. Negro Alexander Vinsent*, 38.
2. An officer of the United States being the *bonâ fide* owner of a slave in the fortress Munroe, a place within the United States, but not within the jurisdiction of any one of the States, and removing thence with his family to the city of Washington, D. C., to reside therein, and bringing his slave with him, cannot lawfully sell such slave within three years after such removal and importation; and such slave, by such importation and sale, becomes free. *Negro Sally Moody v. Fuller*, 303.
3. The petitioner claimed freedom under the following clause of the will of the testatrix: "I will that George, if he behaves well until the year 1837, and continues to hire for good wages, shall, at the end of that year, be free." *Held*, that it was competent for the defendant to show that the petitioner did not behave well, &c., but ran away. *Negro George Coots v. Morton*, 409.
4. Neither the complainant nor his wife can be examined as a witness against the defendant, in a bill for injunction to restrain the defendant from removing from the District of Columbia the plaintiff's slave, who had been sold by the plaintiff to the defendant for a term of years only, at the expiration of which term, the slave is to be free. *Thomas v. Mackall*, 536.
5. If a Maryland slave, with his consent, be carried to Virginia, and kept there more than a year by the person to whom he was hired or loaned in Maryland, without the consent of the owner of such slave, no time is limited within which the owner must use coercive measures for the recovery of the slave; and the omission to use such measures, does not give him any title to freedom; but the owner may reclaim the slave at any time. *Negro Kennedy v. Clarissa Purnell*, 552.

FREEDOM, (*Continued*.)

6. If a Maryland slave, hired or loaned, in Maryland, to a resident in Maryland, be carried by the person to whom he is so hired or loaned, into Virginia, with a view to temporary residence only, and for necessary attendance, and to make a transient stay, and the slave at the end of such transient stay, be carried or sent out of the State of Virginia again, the slave does not thereby become entitled to freedom, although all these acts were done with the consent of the owner. *Ibid*.
7. In consideration that the plaintiff, at the defendant's request, would sell and deliver to the defendant, for the price of \$660, two negroes of the value of \$2,000, as slaves for life, the defendant promised the plaintiff he would not sell them to any person south of the Potomac out of the District of Columbia, and would not remove them out of the District of Columbia south of the Potomac, and that on such removal the said slaves should be immediately entitled to their freedom. The plaintiff, relying on the defendant's said promise, and in consideration of \$660 paid to him by the defendant, sold and delivered the said slaves to the defendant for that price. The defendant sold them to persons south of the Potomac out of the District of Columbia, and removed them out of the District of Columbia south of the Potomac.
Held, on demurrer, that the plaintiff had no cause of action against the defendant. *Corcoran v. Jones*, 607.
8. If the return of a writ of *habeas corpus* be evasive and insufficient, the party refusing to produce the bodies of the prisoners, if present in Court, will be committed until he produce them, or be otherwise discharged. If, when produced, the prisoners appear to be held as slaves, and claim to be free and file their petitions for freedom, the person claiming them as slaves, will be required by the Court to give security for their forthcoming, to prosecute their claim for freedom; and if he fail to give such security, the Court will order them to be taken into custody of the marshal for safe-keeping, until their trial, or the further order of the Court. *United States v. Thomas N. Davis*, 622.
9. If a female slave be sold in Alexandria county, District of Columbia, ("she to be free at thirty-one, and her children then born, and those afterward to be born, at the same age,") a child of such slave, afterward born before her age of thirty-one, is entitled to freedom when arrived at the age of thirty-one years. *Negro Moses Graham v. R. B. Alexander*, 663.
10. See EVIDENCE, 48. *Negro Ann Bell v. Greenfield*, 669.
11. In the will of Maria T. Greenfield is the following clause: "I also give and bequeathe to my nephew, Gerard T. Greenfield, all my negro slaves, namely, Ben, Mansa, James," &c. (naming seventeen slaves); "Provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events, I will and desire the said negroes to be free for life." The legatees sold one of them (the petitioner,) to the defendant. *Held*, that the petitioner thereby became entitled to his freedom. *Negro James Ash v. W. H. Williams*, 674.

FRENCH TREATY.

1. See EQUITY, 1, 2, 3, 4, 5, 6, 7, 8. *Ridgway v. Hayes et al.* 23.
2. See ANSWER. *Dutilh v. Coursault*, 349.
3. See EQUITY, 19, 20, 21, 22. *Ibid*.
4. *Id.* 26. *Mason v. Cutts*, 465.

GAMING.

1. An indictment for keeping "a faro-bank," is bad, unless it aver the faro-bank to be a common gaming-table. *United States v. B. Ringgold*, 378.
2. An indictment for keeping "a certain public gaming-table, called faro-bank," is bad. *Ibid*.
3. An indictment for keeping "a gaming-table," is also bad. *Ibid*.
4. An indictment for keeping "a gaming-table," is insufficient; it should charge the keeping of a common gaming-table. *United States v. George Milburn*, 390.
5. An indictment for keeping "a faro-bank," is also bad; it should be a common faro-bank; or a faro-bank, the same being a common gaming-table. *Ibid*.

GRAND-JURORS.

- See ABATEMENT, 1. *United States v. Richard H. White*, 457.

GUARDIAN.

1. In debt upon a guardian's bond, taken by the Orphans' Court in the county of Washington, District of Columbia, this Court refused to permit the defendant to show by testimony that no land descended nor was devised to the orphan in that county, and that he was not entitled to a distributive share of the personal estate of any intestate, or to a legacy, or bequest under the last will and testament of any person on whose personal estate any administration had been granted in that county; and that no friend of the orphan had applied to the Orphans' Court to require the guardian to give bond; in order to show that that court had not authority or jurisdiction to take the bond. *United States, use of Gody v. Bender*, 620.
2. A guardian here is liable to account for money of his ward received in Maryland for land sold in Maryland. *Ibid.*
3. If a guardian receive a negotiable note in payment of a debt due to his ward, he is liable for the same to his ward, although he has not received the money. *Ibid.*

HIABEAS CORPUS.

See FREEDOM, 8. *United States v. Davis*, 622.

IGNORANCE OF THE LAW.

See CORPORATION OF WASHINGTON, 5. *Corporation of Washington v. Barber*, 157.

INDEBITATUS ASSUMPSIT.

See CONTRACT, 2. *Fresh v. Gilson*, 533.

INDICTMENT.

1. A count for stealing, and a count for receiving stolen goods may be contained in the same indictment; and the Attorney of the United States, will not be put to his election upon which to proceed. *United States v. Negro Ralph Prior*, 37.
2. See CONFESSION. *Ibid.*
3. See ASSAULT AND BATTERY, 1, 2, 3. *United States v. Negro James Herbert*, 87.
4. See DISORDERLY HOUSE, 1. *United States v. Charles Columbus*, 304.
5. See BANK, 1, 2, 3. *United States v. Noble*, 371.
6. See GAMING, 1, 2, 3. *United States v. B. Ringgold*, 378.
7. *Id.*, 4, 5. *United States v. George Milburn*, 390.
8. See DOG, 2, 3. *United States v. McDuell*, 391.
9. See ABATEMENT, 1. *United States v. R. H. White*, 457.
10. An indictment upon the first section of the Act of Congress of the 7th of July, 1838, c. 212, "to restrain the circulation of small notes as a currency in the District of Columbia, and for other purposes," should aver that the note passed, or offered to be passed, was "paper currency." *Stettinius v. United States*, 573.
11. An indictment upon the second section of that act, should aver that the note issued was "paper medium evidently intended for common circulation." *Ibid.*
12. The passing of a note of less denomination than five dollars, is not an offence against the statute, unless it be "paper currency" or "paper medium evidently intended for common circulation." The offence under the statute does not consist in circulating paper as currency, but in passing paper currency; that which is already currency, or evidently intended for common circulation. *Ibid.*
13. It is no justification for passing such paper as the act prohibits, that it was passed in payment of a *bonâ fide* debt; nor that it was passed with intent that it should be carried out of the district; nor that the defendant was agent of the railroad company. *Ibid.*
14. The term "bank-bill" as used in the act, does not, of itself, purport to be paper currency without a special averment to that effect. *Ibid.*
15. See BAIL, 1, 2. *United States v. R. H. White*, 368.

INFANT.

1. Infants whose property has been sold for taxes, may redeem at any time within one year after arriving at full age. *Mockbee v. Upperman*, 535.
2. See EQUITY, 43. *Ritchie v. Bank of the United States*, 605.
3. See COVENANT. *Kurtz v. Becker*, 671.

INJUNCTION.

1. See EQUITY, 8. *Ridgway v. Hays*, 23.
2. Id. 34, 35. *Roach v. Hulings*, 637.

INSOLVENT.

1. Upon allegations filed in court within two years after the application of an insolvent debtor for the benefit of the Insolvent Act, if the defendant do not appear to answer the same, after having been duly summoned, the Court will take evidence *ex parte* in support of the allegations, and if they find them to be true, will direct that the order of discharge before made by a judge out of Court, be rescinded, and that the debtor be precluded from the benefit of the act. *Hayman v. Mozley*, 36.
2. A discharge under the Insolvent Law of the District of Columbia, does not operate against a non-resident creditor, unless he be the creditor at whose instance the debtor is confined at the time of the discharge. A non-resident creditor does not, by bringing an action against his debtor in the District of Columbia, cease, in law, to be "a creditor residing without the limits of the District of Columbia," nor does he thereby waive the benefit given to non-resident creditors by the Act of Congress of the 6th of May, 1822. *Brook et al. v. Brown*, 486.
3. A debtor, who is out on bail, is not in confinement at the instance of his creditor, within the meaning of the Act of the 6th of May, 1822. Confinement within the meaning of that act, is actual confinement in gaol, or in the prison bounds, at the time of the debtor's discharge. *Ibid.*
4. If the defendant has been discharged under the Insolvent Law of Maryland, the bail will be exonerated. *Clagget v. Ward*, 669.

INSURANCE.

See DEVIATION. *West v. Columbian Ins. Co.* 309.

INTEREST.

1. When the *mandamus* is to credit a certain sum of money, it is a sufficient obedience to the writ, to credit that sum without interest. *United States v. Amos Kendall*, *Post-master-General*, 385.
2. See EQUITY, 30, 31. *Markoe v. Coxe*, 537.
3. When the question of interest is expressly reserved at the time of the receipt of the principal, such a receipt is no bar to the recovery of the interest. *Burr v. Burch*, 506.

JOINT DEFENDANTS.

1. If three are charged with obtaining money by false pretences, and one only receive the money, the others are not guilty under the statute which punishes those only who obtain the fruit of the fraud. *Harriet Jones and Letty Clarke v. United States*, 647.
2. If three be jointly indicted for obtaining a check by false pretences, and it happen that the check is delivered to one of the three, in the absence of the other two, who afterwards participate in the proceeds of the check, they are all equally guilty. *Ibid.*
3. See COVENANT. *Kurtz v. Becker*, 671.

JUDGMENT.

1. A judgment binds lands subsequently acquired. *Rachel Jackson v. Bank of the United States et al.* 1.
2. If the judgment be revived between the original parties, it is not necessary to issue a *scire facias* against the terre-tenants who purchased more than a year after the judgment, and before its revival; nor is it necessary, during the life of the original defendant, to issue any *scire facias* to his vendees, who purchased after the judgment; nor to bring in all the terre-tenants; nor is it material that the debtor was solvent for a long time after the judgment; for purchasers are bound to take notice of judgments on record. *Ibid.*
3. It is no objection that the judgment is of twelve years' standing, if it has been revived within the twelve years, and twelve years have not elapsed since the revival. *Ibid.*
4. It seems that a purchaser of lands bound by a judgment against the vendor may move to quash the execution upon its return, or may have an *audita querela*. *Ibid.*

JUDGMENT, (*Continued.*)

5. See ASSAULT AND BATTERY, 1. *United States v. Negro James Herbert*, 87.
6. See AMENDMENT, 1. *United States v. Fearson*, 95.
7. After a sentence of imprisonment has been in part executed, the Court will not rescind it and grant a new trial, although moved for at the same term, it being doubtful whether the Court has the power to do so. *United States v. James Hastings*, 115.
8. A judgment of a justice of the peace, being in part for a matter not within his jurisdiction, is void *in toto*. *Foy v. Talburt*, 124.
9. If, after judgment, an entry be made in the clerk's docket, intimating that the judgment is for the use of a third person, the Court will not interfere to order it to be stricken out after the term in which the judgment was rendered. *Bradley v. Eliot*, 293.
10. See EXECUTION, 2. *Bowen v. Howard*, 308.
11. If the verdict be general, and one of the counts be bad, the judgment must be arrested; and the Court will not, after the verdict has been recorded, order it to be amended by applying it to the good count only, unless the evidence given was applicable only to that count. *Fenwick v. Grimes*, 439.
12. A judgment by default, at the imparlance term, in the county of Washington, is regular, the rule to plead having expired in the preceding vacation. *Linthicum v. Remington*, 546.
13. See EQUITY, 35. *Roach v. Hulings*, 637.
14. In actions of replevin, in all cases where judgment is to be entered up for the defendant, it should be for a return. *Hemstead v. Colburn*, 655.

JURISDICTION.

1. See EQUITY, 11. *White v. Clarke et al.* 102.
2. See ADMINISTRATION, 1. *Foy v. Talburt*, 124.
3. The Circuit Court of the District of Columbia, has authority to issue a *mandamus* to an officer of the United States, commanding him to perform a ministerial duty required by an Act of Congress, in which the right of an individual is concerned, if that right is clear, and he has no other legal specific remedy. *United States, at the relation of Stokes et al. v. Amos Kendall, Post-master-General*, 163.
4. A justice of the peace may have jurisdiction, incidentally, of a matter of which he would not, if it were the principal cause of action; therefore, he may have jurisdiction in an action of debt upon a bond in the penalty of fifty dollars, conditioned that if a certain bay mare should be proved not to be the property of J. B., the bond should be in full force; otherwise void; and thus collaterally try the title to the mare. *Moore v. Waters*, 283.
5. See CHANCELLOR OF MARYLAND, 1. *Bank of the United States v. Van Ness*, 294.
6. See ADMINISTRATION, 2, 3. *Atkinson v. Robbins*, 312.
7. The justices of the peace have jurisdiction in cases of small debts against women. *Negro Harriet Johnson v. Corporation of Washington*, 434.
8. See ATTACHMENT, 8. *Hurd v. Stone*, 503.
9. See CERTIORARI, 2. *Homans v. Moore*, 505.
10. A justice of the peace has jurisdiction against executors and administrators, under the Act of Congress of the first of March, 1823. *Ennis v. Holmead*, 509.
11. See GUARDIAN, 1, 2, 3. *United States, for the use of Gody v. Bender*, 620.
12. See APPEAL, 2. *Newton v. Carbery*, 626.

JURY.

1. Arson is not a capital offence in the District of Columbia. The defendant, therefore, in the county of Washington, is not entitled to a peremptory challenge. *United States v. H. H. White*, 73.
2. It is improper to give any instruction to the jury, after they have retired, upon any question not asked by the jury. *United States v. Richard H. White*, 116.
3. A new trial will not be granted because the jury, by mistake, took out with them the plaintiff's account, if it be withdrawn from them in a few minutes afterwards, by order of the Court. *Simms v. Templeman*, 163.
4. The Court will not permit counsel to argue to the jury, against an instruction given by the Court in the cause. *United States v. Charles Columbus*, 304.
5. It is error in a judge to instruct the jury that the evidence is sufficient to convict the defendant. The sufficiency is to be decided by the jury. *United States v. Fenwick*, 562.

JURY, (*Continued.*)

6. See EVIDENCE, 44, 45. *Harriet Jones et al. v. United States*, 647.

7. The jurors are not judges of the law, even in a criminal case. They have the power to give a general verdict upon the general issue, which includes the question of law as well as of fact; but when by pleading, or by special verdict, or demurrer to evidence, the law is separated from the fact, they have no right to decide the law. It must be decided by the judge.

The right and power of the jury, whatever they may be, are exactly alike in civil and in criminal cases.

The argument of counsel, on the law, should be addressed to the judge; and when the question of law is judicially presented to him unmixed with the fact, either by demurrer to the evidence, a special verdict, or a motion for an instruction to the jury upon a hypothetical state of facts, it is not only the right but the duty of the judge to decide the question. The right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instructions as may be asked. After the argument of counsel has been closed on both sides, he may, if he will, instruct the jury as to the law upon the whole evidence, leaving the question of fact entirely to the jury.

The process of attainr is obsolete in England, and never was in practice in this country.

In practice, both in this country and in England, the counsel for the defendants in criminal cases, have been allowed to argue the law to the jury upon the general issue.

The jury have the power to take upon themselves the responsibility of judging for themselves, of the meaning of the law; and they may, if they will, but not of right, find a verdict against law; and such a verdict, if in favor of the defendant, will be as conclusive and effectual as if it were according to law.

According to the general practice of the courts in this country, the defendant seems to have a right to be heard before the jury, upon his construction of the law, if the court has not already, after hearing the argument of the defendant's counsel, instructed the jury upon the law in the same case; but there are few, if any, courts of criminal jurisdiction who will suffer counsel to appeal from the court to the jury upon a question of law which the court has decided against the defendant after he has orally joined issue upon the question, and argued it before the court. If the defendant's counsel does not join in the argument to the court, but insists upon arguing to the jury, the court will require him to proceed with his argument to the jury, and will, after argument, give or refuse such instruction as the court shall think proper.

It is the duty of the jury to follow the law as laid down by the Court. *Stettinius v. United States*, 573.

JUSTICE OF THE PEACE.

1. See ADMINISTRATION, 1. *Foy v. Talburt*, 124.

2. See JURISDICTION, 4. *Moore v. Waters*, 283.

3. See ARREST. *Johnson v. Daws*, 283.

4. See EXECUTION, 2. *Bowen v. Howard*, 308.

5. See APPEAL, 1. *Owner v. Corporation of Washington*, 381.

6. See JURISDICTION, 7. *Negro Harriet Johnson v. Corporation of Washington*, 434.

7. A justice of the peace cannot issue an execution as on a *supersedeas* upon the mere indorsement upon the back of the original judgment, that it was superseded. *Amelia Thomas v. Owen Summers*, 434.

8. See CERTIORARI, 2. *Homans v. Moore*, 505.

9. See JURISDICTION, 10. *Ennis v. Holmead*, 509.

10. See APPEAL, 3. *Jeffers v. Forrest*, 674.

LANDLORD AND TENANT.

1. See DISTRESS, 1, 2, 3, 4, 5. *Semmes v. McKnight*, 539.

2. See ACTION ON THE CASE. *Brown v. Corcoran*, 610.

LANDS.

See JUDGMENT, 1, 2, 3, 4. *Rachel Jackson v. Bank of the United States*, 1.

LARCENY.

1. See INDICTMENT, 1. *United States v. Negro Ralph Prior*, 37.

2. See FALSE PRETENCES, 1. *United States v. Robertson*, 38.

3. See BANK, 4. *United States v. Negro Frank Pearl*, 392.

LARCENY, (*Continued.*)

4. If the goods of several persons are stolen at the same time, the stealing of each person's goods constitutes a distinct offence, and may be the subject of a distinct and separate indictment; but they may be joined in one indictment; and whether they shall be prosecuted jointly or separately, is a question properly left to the discretion of the Attorney for the United States. *United States v. Beerman*, 412.
5. It is error in the judge to instruct the jury that certain facts constitute larceny, unless the *animus furandi* be expressly stated as one of those facts; and unless the fact be also stated that the goods were taken without the consent of the owner. *Weston v. United States*, 492.

LEASE.

1. See EQUITY, 15. *Van Ness v. Hyatt et al.* 127.
2. See EVIDENCE, 18. *Slacum v. Brown*, 315.
3. See DISTRESS, 1, 2, 3, 4, 5. *Senmes v. McKnight*, 539.
4. If there be a lease for years with right of reëtry for non-payment of rent, and six months' rent be in arrear, and no sufficient personal property on the premises to countervail the rent arrear, the lessor may, under the statute of 4 Geo. 2, which is in force in the county of Washington, recover in ejectment, as if he had made a strict demand of the rent, and had entered. But the lessor cannot recover while the lease is in full force, unless forfeited by the right of reëtry, and the proceeding to serve a declaration in ejectment, according to the provisions of that statute; six months' rent being arrear and not sufficient goods on the premises to countervail the rent. *Bradlay et al. v. Conner*, 615.

LEGACY.

1. See ADMINISTRATION, 12. *Moffit v. Varden*, 658.
2. See DISTRIBUTION, 2, 3. *Ibid.*
3. See DEVISE, 2, 3, 4. *Newton v. Carbery*, 632.

LIBEL.

See BAIL, 19. *Mayo v. Smith et al.* 569.

LICENSE.

1. See CORPORATION OF WASHINGTON, 1. *Carey v. Corporation of Washington*, 13.
2. A license to practice medicine is not necessary, if there be no board of examiners *de jure*. *United States v. John Williams*, 62.
3. See CORPORATION OF WASHINGTON, 5. *Corporation of Washington v. Barber*, 157.
4. *Id.* 8, 9. *Corporation of Washington v. Lynch*, 498.

LIEN.

1. See EQUITY, 9. *Thompson v. King*, 93.
2. See EXECUTION, 9. *Cunningham v. Offutt*, 524.
3. No debt for materials furnished for building a house in Washington, Alexandria, or Georgetown, District of Columbia, will, under the Act of Congress of the 2d of March, 1833, remain a lien upon the house for more than two years from the commencement of the building, unless an action for the recovery of the debt be instituted, or the claim filed within three months after furnishing the materials, &c. *Waller v. Dyer et al.* 571.
4. See JUDGMENT, 1, 2, 3, 4. *Rachel Jackson v. Bank of the United States*, 1.

LIMITATION.

1. See JUDGMENT, 3. *Rachel Jackson v. Bank of the United States*, 1.
2. The Court will not quash an indictment, because it appears upon the record that the indictment was not found within two years after the offence committed, for that would deprive the United States of the right to reply that the defendant was a person fleeing from justice; or to show it in evidence on the trial. The defendant may avail himself of the limitation, either by special plea, or by evidence upon the general issue. *United States v. Richard H. White*, 38.
3. The statute of limitations runs in favor of the offender, although it was not known to the United States, or any of their officers of justice, that he was the person who committed the offence. *Ibid.*
4. The departure of the offender from the vicinity of the place wherein the offence was committed, to his usual residence in another part of the United States, for

LIMITATION, (*Continued.*)

the purpose of avoiding punishment for that, or any other offence, is a fleeing from justice, and the statute of limitations is no bar to the prosecution, unless within two years he returned to the place wherein the offence was committed, and his return was so open and public, and under such circumstances that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him, and that two years and more have elapsed since that period to the time of finding the indictment. *Quære. Ibid.*

5. See EVIDENCE, 9. *United States v. Henry H. White*, 73.
6. *Ibid.* 11. *United States v. Richard H. White*, 116.
7. If a statute punishes that, as a misdemeanor, which at common law was a felony, the limitation of a prosecution under that statute, is that of misdemeanor, and not that of felony. *United States v. Henry H. White*, 73.
8. The limitation is applicable to misdemeanors created by statute subsequent to the act of limitation. *Ibid.*
9. The defendant is not entitled to the benefit of the limitation, if, within the two years he left any place, or concealed himself to avoid detection or punishment for any offence; but it is not necessary that the United States should have known that he was the offender. *Ibid.*
10. Limitation may be given in evidence by the defendant under the general issue in a criminal cause; and the United States may give in evidence the fact that the defendant fled from justice, and therefore was not entitled to the benefit of the limitation. *Ibid.*
11. See EVIDENCE, 11. *United States v. Richard H. White*, 116.
12. The defendant, in a prosecution for a misdemeanor, is not entitled to the benefit of the limitation in the Act of Congress of the 30th of April, 1790, § 31, if within the two years he fled from justice; although he should within the two years have returned openly to the place where the offence was committed, so that with ordinary diligence and due means he might have been arrested.
If within two years after the commission of the offence, the defendant left the district in which it was committed, with intent to avoid detection or punishment for that offence, he was a "person fleeing from justice," although he might at various other periods within the two years, have been arrested in the United States. *Ibid.*
13. The defendant had pleaded the statute of limitations in due time, and had also demurred to the whole declaration;
The Court permitted him to withdraw his demurrer, and to let the plea of limitations remain. *Suckley v. Slade*, 123.
14. See DEMURRER, 3. *United States v. Richard H. White*, 368.
15. Not guilty within three years is a good plea in trover. *Barnard v. Tayloe*, 403.
16. The county of Alexandria in the District of Columbia, is not "beyond seas" as to the county of Washington in the same district. *Bank of Alexandria v. Dyer*, 403.
17. See ADMINISTRATION, 8. *Lupton v. Janney*, 474.
18. An acknowledgment of a claim is not sufficient to take a case out of the statute of limitations. *Archer v. Poor*, 542.
19. *Non assumpsit* within five years is not a good plea to an action of *assumpsit* upon a promise to collect money and account for it. The cause of action does not arise until the money has been received by the defendant, and demanded by the plaintiff. *Gardner v. Peyton*, 561.
20. A person in Alexandria County, D. C., is not "beyond seas" within the meaning of the Act of Limitations, in regard to persons residing in Washington county; the residence of the defendant in Alexandria county may, therefore, be added to his residence in Washington county, so as to enable him to plead in Washington county, the Maryland Statute of Limitation of "twelve years' standing" to a bond. *Suckley v. Slade*, 617.

LOTTERY.

1. See EQUITY, 32. *Smith v. Chesapeake & Ohio Canal Company*, 563.
2. See CORPORATION OF WASHINGTON, 15. *France v. Corporation of Washington*, 667.

MANDAMUS.

1. See EXECUTIVE OFFICERS, 1 to 8, inclusive. *United States v. Kendall*, 163.
2. See ATTACHMENT, 1. *Ibid.* 385.

MANDATE.

See ATTACHMENT, 14. *White v. Clarke et al.* 530.

MARINE CORPS.

See APPRENTICE, 1, 2. *Ex parte William Browne*, 554.

MARSHAL.

1. See EXECUTION, 4. *United States v. Williams*, 400.
2. *Id.* 7. *Gaylor v. Dyer*, 461.
3. See ATTACHMENT, 10. *Allen v. Croghan*, 517.
4. See EXECUTION, 9. *Cunningham v. Offutt*, 524.
5. See AMENDMENT, 3. *Linthicum v. Remington*, 546.
6. See EXECUTION, 35. *Ibid.*
7. See ESCAPE. *United States v. Williams*, 619.

MEDICAL SOCIETY.

1. In a prosecution for practising in the medical art, and receiving payment therefor in the District of Columbia, without having first obtained a license from the medical board of examiners of that District, or producing a diploma, the Court will not compel a witness to produce the medicine which he received from the defendant. In such a prosecution the Court will not permit the United States to examine as to any specific instances of which previous notice has not been given. *United States v. John Williams*, 62.
2. The application, by an oculist, of a liquid to the eyes, is not the practice of medicine, but rather of surgery. *Ibid.*
3. In such a prosecution, it is competent for the defendant to show that the charter is vacated by *non-user*, and that there was no board of examiners *de jure*. A board of examiners not elected, or continued in being by filling up vacancies, but elected annually, is not a legal board. *Ibid.*
4. It is incumbent on the United States to show that the Medical Society had a corporate existence at the time when, &c.; that the board of examiners was originally elected by at least seven members of the society, and that the officers were duly appointed; and that if the minutes of the proceedings of the society were lost, the United States must prove their contents, and show that at the time when, &c. there was a competent board of examiners *de jure*. *Ibid.*
5. An information in the nature of a writ of *quo warranto* will not be issued at the suit of an individual alone, to try the validity of a private corporation. But upon an indictment for a violation of the charter, the defendant may show that the charter was vacated. *Ibid.*
6. See LICENSE, 2. *Ibid.*

NEW TRIAL.

1. See JUDGMENT, 7. *United States v. James Hastings*, 115.
2. See JURY, 3. *Simms v. Templeman*, 163.

NOLLE PROSEQUI.

See COVENANT. *Kurtz v. Becker*, 671.

NOTARY.

See BILLS AND NOTES, 2. *Whitney v. Hunt*, 120.

NOTICE.

1. See BILLS AND NOTES, 2. *Whitney v. Hunt*, 120.
2. See EJECTMENT, 3. *Worthington v. Etcheson*, 302.
3. *Id.* 5. *Costigan v. Wood*, 507.
4. See DEPOSITION, 4. *Young v. Davidson*, 515.
5. See EQUITY, 36. *Walker v. Parker*, 639.

ORPHANS' COURT.

1. See ADMINISTRATION, 2, 3. *Atkinson v. Robbins*, 312.
2. *Id.* 5, 6, 7, 8. *Lupton v. Janney*, 474.
3. See APPEAL, 2. *Newton v. Carbery*, 626.
4. The Orphans' Court has no power to annex conditions to the payment of the dividend of a judgment at law, recovered against the intestate for instalments due upon the stock of the Chesapeake and Ohio Canal Company. *Chesapeake & Ohio Canal Company v. Johnson*, 643.

PARTNERSHIP.

1. If there has been no settlement of the partnership accounts, one partner cannot maintain an action at law against the other for any matter relating to their partnership affairs. *Pote v. Phillips*, 154.
 2. Although the partnership accounts may have been settled, and a balance acknowledged to be due by one partner to the other; yet the creditor-partner cannot maintain an action at law for that balance, without proving an express promise by the debtor-partner to pay it. *Ibid.*
 3. Where, during a long period of mercantile intercourse between the principal and factor, it appeared that the principal was permitted, upon shipments of tobacco, to draw bills for the estimated value thereof, which bills the factor was in the habit of accepting and paying, whether the cargoes were or were not sold; and the factor being generally in advance, and charging interest upon his advances, and giving credit for interest upon the net proceeds of the cargoes; shipments made after the dissolution of the firm of the principal, by the death of one of the partners, to the factor (upon the credit of which shipments, bills were drawn by the surviving partner according to the usual course of their former dealing,) were held to have been made according to such usual course, and were not to be applied to the liquidation of the general debt due by the principal to the factor at the time of the dissolution; but were to be applied, in the first place, to meet the bills drawn upon the credit of such shipments; and the surplus only, if any, to be applied to the liquidation of the general balance due by the principal to the factor.
- But if the bills thus drawn by the surviving partner, and paid by the factor, exceeded the net proceeds of the cargoes thus shipped after the dissolution of the firm, the excess was not chargeable to the estate of the firm, but to the survivor only; it not being competent for him to charge the estate of the firm by drawing bills after the dissolution. *Dick v. Laird*, 328.

PARTITION WALL.

1. See CORPORATION OF WASHINGTON, 13. *Miller v. Elliot*, 543.
2. See CITY SURVEYOR. *Ibid.*

PENSION.

See EVIDENCE, 20. *United States v. Skam*, 367.

PERJURY.

See EVIDENCE, 20. *United States v. Skam*, 367.

PHYSICIAN.

1. See LICENSE, 2. *United States v. John Williams*, 62.
2. See MEDICAL SOCIETY, 1, 2, 3, 4, 5. *Ibid.*

PLEADING.

1. See AMENDMENT, 2. *Suckley v. Slade*, 123.
2. See EJECTMENT, 1. *Worthington v. Etcheson*, 302.
3. See EVIDENCE, 22. *Steam Packet Company v. Bradley*, 393.
4. See LIMITATION, 15. *Barnard v. Tayloe*, 403.
5. See ATTACHMENT, 3. *Ten Broeck v. Pendleton*, 464.
6. See ABATEMENT, 2. *Fenwick v. Grimes*, 603.
7. See EVIDENCE, 33. *Lenox v. Gorman*, 531.

POSSESSION.

1. See BARGAIN AND SALE. *Fraser et al. v. Hunter*, 470.
2. The possession of a person claiming title without definite metes and bounds, will not in law be deemed to extend beyond the actual possession proved. *Ibid.*
3. There must be actual possession by the plaintiff, of the *locus in quo* at the time of the supposed trespass. *Ibid.*
4. See EJECTMENT, 5. *Costigan v. Wood*, 507.
5. See DECREE, 4. *Carroll v. Dowson*, 514.
6. If the plaintiff in replevin never had previous possession of the goods replevied, the Court, will, of course, order them to be returned to the defendant on motion, upon the usual security. *Emack v. Crabb*, 611.
7. See EJECTMENT, 7, 8, 9, 10, 12. *Wilkes v. Elliot*, 611.

POSTMASTER GENERAL.

1. See EXECUTIVE OFFICERS, 1 to 8 inclusive. *United States v. Amos Kendall*, 163.
2. See ATTACHMENT, 1. *Id.* 385.

PRACTICE.

1. See EVIDENCE, 2, 3, 5, 6, 8. *United States v. Richard H. White*, 38.
2. See AMENDMENT, 2. *Suckley v. Slade*, 123.
3. See JUDGMENT, 9. *Bradley v. Elliot*, 293.
4. See EJECTMENT, 1, 2, 3, 4. *Worthington v. Etcheson*, 302.
5. See REPLEVIN, 5, 6, 7. *Walker v. Hunter*, 462.
6. See ATTACHMENT, 3. *Ten Broeck v. Pendleton*, 464.
7. See AMENDMENT, 3. *Linthicum v. Remington*, 546.
8. See DEPOSITION, 5. *Leatherberry v. Radcliffe*, 550.
9. See EQUITY, 33. *Patriotic Bank v. Bank of Washington*, 602.
10. See FREEDOM, 8. *United States v. Thomas N. Davis*, 622.
11. See EQUITY, 35. *Roach v. Hulings*, 637.

PUBLIC OFFICER.

- See BAIL, 10. *Davis v. Garland*, 570.

RECOGNIZANCE.

1. After the term in which a recognizance has been forfeited, in a criminal case, the Court cannot remit the forfeiture; but the President of the United States can, under the Act of Congress. *United States v. Cookendorfen*, 113.
2. See BAIL, 2. *United States v. Richard White*, 368.

RELIGIOUS SECT.

- See DEVISE, 2, 3, 4. *Newton v. Carbery*, 632.

RENT.

1. See EVIDENCE, 18. *Slacum v. Brown*, 315.
2. An assignment of rents, with a power of attorney to collect them as they shall become due, is a valid assignment in equity, although the assignor should die before they are collected. *Taylor v. Moore's Administrator*, 317.
3. See DISTRESS, 6. *Remington v. Linthicum*, 345.
4. See LEASE, 4. *Bradlay v. Conner*, 615.

RENTS AND PROFITS.

1. The only cases in which the Court has permitted the heirs of a deceased debtor to have the rents and profits, until the sale of real estate sold to pay the debts of the ancestor, are cases of sale, under the Act of Maryland, for deficiency of personal assets. *Bank of United States v. Peter*, 485.
2. See EQUITY, 30. *Markoe v. Coxe*, 537.
3. See DISTRESS, 1, 2, 3, 4, 5. *Semmes v. McKnight*, 539.
4. See EQUITY, 43. *Ritchie v. Bank of United States*, 605.

REPLEVIN.

1. Papers which have been filed in the proper accounting office of the Treasury of the United States, as vouchers or documents, to justify the settlement of a public account, are not liable to be taken from the public officer by replevin. *W. L. Brent v. Peter Hagner*, 71.
2. See DISTRESS, 6. *Remington v. Linthicum*, 345.
3. See EXECUTION, 7. *Gaylor v. Dyer*, 461.
4. See CONSTABLE. *Brent v. Beck*, 461.
5. The Court will not, in replevin, order a non-pros. at the motion of the defendant, after the jury is sworn. *Walker v. Hunter*, 462.
6. In replevin, the plaintiff may recover according to the extent of his title proved. *Ibid.*
7. Form of verdict when the plaintiff proves a title to a part only of the goods replevied. *Ibid.*
8. See EVIDENCE, 33. *Lenox v. Gorman*, 531.
9. See POSSESSION, 6. *Emack v. Crabb*, 611.
10. Upon a replevin-bond the plaintiff may recover, although there has been no judgment for a return of the property; but the plaintiff must show that he has sustained damage by the failure of the plaintiff in replevin to prosecute his writ with effect. *Burch v. Dowling*, 646.
11. See DAMAGES, 6. *Hemstead v. Colburn*, 655.

RETAILER.

- See BY-LAW, 1. *Corporation of Washington v. Casanave*, 500.

ROCK CREEK.

See CHESAPEAKE AND OHIO CANAL COMPANY. *Chesapeake and Ohio Canal Company v. Union Bank*, 509.

RUNAWAY.

1. A warrant of commitment of a person as a runaway, is not sufficient, unless it state on its face that the party has been convicted of being a runaway servant or slave. It is not sufficient to state in the warrant that the party is "charged with being a runaway." *Negro Wm. Richardson's Case*, 338.
2. *Quære*. Whether the old laws of Maryland respecting runaways, are applicable to this part of the District of Columbia? *Ibid*.

SALE.

1. See CORPORATION OF WASHINGTON, 34. *Rodbird v. Rodbird*, 125.
2. See BILLS AND NOTES, 6, 7, 8, 9. *Semmes v. Wilson*, 285.
3. If a lot of bacon be advertised in the Gazette, by the vendor, as "prime," and the vendee examine it, and afterwards agree to purchase it, and it proves to have been unsound, he cannot recover damages upon the warranty, although he should have paid a sound price for it. *McViegh v. Messersmith*, 316.
4. See BANK, 5. *Guttschlick v. Bank of Metropolis*, 435.
5. See EJECTMENT, 5. *Costigan v. Wood*, 507.
6. See DECREE, 4. *Curroll v. Dowson*, 514.
7. See CORPORATION OF WASHINGTON, 12. *Mockbee v. Upperman*, 535.
8. See RENTS AND PROFITS, 1. *Bank of the United States v. Peter*, 485.
9. See BILLS AND NOTES, 13. *Smith v. Arden*, 485.
10. See EQUITY, 30. *Markoe v. Cox*, 537.
11. See DISTRESS, 1, 2, 3, 4, 5. *Semmes v. McKnight*, 539.
12. See EQUITY, 43. *Ritchie v. Bank of the United States*, 605.
13. See EJECTMENT, 12. *Wilkes v. Elliot*, 611.
14. See LEASE, 4. *Bradlay v. Conner*, 615.
15. See EXECUTION, 2. *Bowen v. Howard*, 308.
16. See FREEDOM, 7. *Corcoran v. Jones*, 607.

SCIRE FACIAS.

See JUDGMENT, 1, 2, 3, 4. *Jackson v. Bank of the United States*, 1.

SENTENCE.

1. See JUDGMENT, 7. *United States v. Hastings*, 115.
2. If a man be convicted of a second offence while in the penitentiary under the first, the sentence for the second may be made to commence from the expiration, or other termination of the period for which he was first sentenced. *United States v. Negro Joseph Farrell*, 311.

SLAVE.

1. Evidence that a colored person has resided in the county and city of Washington, for a year and more, going at large as a free person, and claiming to be free, in the absence of all contradictory evidence, except color, is sufficient to rebut the presumption of slavery arising from color. *United States v. Negro Priscilla West*, 35.
2. See FREEDOM, 1. *United States v. Negro Alexander Vinsent*, 38.
3. *Id.* 2. *Negro Sally Moody v. Fuller*, 303.
4. See SENTENCE, 2. *United States v. Negro Joseph Farrell*, 311.
5. See EMANCIPATION. *Negro Bacchus Bell v. McCormick*, 398.
6. See FREEDOM, 3. *Negro George Coots v. Morton*, 409.
7. *Id.* 4. *Thomas v. Mackall*, 536.
8. *Id.* 5, 6. *Negro Kennedy v. Purnell*, 552.
9. *Id.* 7. *Corcoran v. Jones*, 607.
10. *Id.* 8. *United States v. Thomas N. Davis*, 622.
11. *Id.* 9. *Negro Moses Graham v. Alexander*, 663.
12. See EVIDENCE, 48. *Negro Ann Bell v. Greenfield*, 669.
13. See FREEDOM, 11. *Negro James Ash v. Williams*, 674.

SMALL NOTES, AS CURRENCY.

See INDICTMENT, 10, 11, 12, 13, 14. *Stettinius v. United States*, 573.

SUPERSEDEAS.

1. See EQUITY, 25. *White v. Clarke & Briscoe*, 401.

SUPERSEDEAS, (Continued.)

2. See JUSTICE OF THE PEACE, 7. *Thomas v. Summers*, 434.
3. See ATTACHMENT, 14. *White v. Clarke et al.* 530.

SURPRISE.

- See EQUITY, 35. *Roach v. Hulings*, 637.

TAXES.

1. See CORPORATION OF WASHINGTON, 3, 4. *Rodbird v. Rodbird*, 125.
2. See CORPORATION OF ALEXANDRIA, 1. *Beale v. Burchell*, 310.
3. See CORPORATION OF WASHINGTON, 12. *Mockbee v. Upperman*, 535.
4. A tax-sale of part of a lot in the city of Washington, in December, 1835, was held to be void because the number of the lot, of which the premises in dispute were a part, was not mentioned, nor stated in the advertisement of the sale, as required by the Charter of Washington of 1820, § 10, and the Act of May 26, 1824. *Bradley v. Conner*, 615.
5. See DISTRESS, 2, 3, 4, 5. *Semmes v. McKnight*, 539.
6. See EJECTMENT, 12. *Wilkes v. Elliot*, 611.

TERRE-TENANTS.

- See JUDGMENT, 1, 2, 3, 4. *Jackson v. Bank of the United States*, 1.

TRUST.

1. See BARON AND FEME, 2. *Markoe & Wife v. Marcy*, 306.
2. Id. 3, 4, 5, 6, 7. *Bank of the United States v. Lee*, 319.
3. See EQUITY, 22. *Dutill v. Coursault*, 349
4. See DAMAGES, 3. *Connolly v. Belt*, 405.
5. If there be no person in existence, competent to receive payment of the debt, to secure which, property has been conveyed in trust, the Court will, after the lapse of sixteen years, decree a conveyance by the trustee to the heirs of the debtor. *Saunders v. Mason*, 470.
6. See DECREE, 4. *Carroll v. Dowson*, 514.
7. See EQUITY, 30. *Markoe v. Coxe*, 537.

USURY.

1. If it was the usage and custom of the banks and exchange brokers, in that part of the country where the note was made and indorsed, to discount such paper at one per cent. for sixty days, and to charge an additional premium of from a half of one per cent. to one per cent. for exchange on eastern paper, when such paper was loaned; and to charge the like discount and premium for the renewal of the notes given therefor, such a transaction is *bonâ fide*, and not intended as a cloak for usury, is not usurious.
Whether the transaction was *bonâ fide* and not intended as a cloak for usury, is a question of fact to be left to the jury under all the circumstances of the case. *Bradley v. McKee*, 298.
2. A covenant absolutely to pay a usurious debt directly to the lender, is not a covenant simply to indemnify the surety, although delivered to the surety, but is a security for the usurious debt, especially if the instrument upon its face does not purport to be a covenant to the surety, but an undertaking to pay the debt directly to the lender of the money.
A covenant to pay an usurious debt to the creditor, is void under the Statute of Virginia, although delivered to the surety who was ignorant of the usury; it being a security for the usurious debt; and the surety who innocently pays the debt, cannot, upon that instrument, recover from the debtor the money thus paid. *Moncure v. Dermott*, 445.
3. If the cause of action be usurious, no waiver of the objection by the defendant, *in pais*, will avail the plaintiff. *Ibid.*
4. If a man in Virginia *bonâ fide* buy a bond at such a discount that the lawful interest upon the bond will produce him twelve per cent. per annum, upon the purchase-money, it is not usury; but if he intended it only as a cloak under which to evade the statute, it is usury.
If there be no loan of money secured by the bond, and it be purchased *bonâ fide*, the transaction is not usurious although purchased at such a discount, as enables the purchaser to obtain an interest of twelve per cent. per annum, upon the purchase money, and although the bond was made to raise money upon, if the purchaser was ignorant of that fact.

USURY, (*Continued.*)

- If the instrument upon which the suit is brought, be a security for the usurious debt, it is void by the statute, and the plaintiffs cannot recover upon it the money which they, as executors of the surety, paid in satisfaction of such usurious debt, although when they paid it they were ignorant of the usury; and it was not necessary that the defendant should have informed them of the usury, and instructed them not to pay it. *Ibid.*
5. See BANK, 7. *Union Bank v. Corcoran*, 513.
 6. The discount, by a bank, of a note made payable directly to itself, is not usurious; such being the usage of the banks. *Bank of Metropolis v. Moore*, 518.
 7. The plaintiff is affected by the usury, although he did not know it when he purchased the checks. *Hill v. Scott*, 523.
 8. By the law of Pennsylvania, in case of a loan at a higher rate of interest than six per cent. per annum, the plaintiff can only recover the sum actually lent, with lawful interest; and the burden of proof is on the plaintiff to show the amount paid by him to the defendant. *Ibid.*

VENUE.

When the defendant, in a criminal prosecution, has offered himself ready, and pressed for trial, in the county of Washington, the Court will not afterwards, when the cause is called for trial, change the venue upon the motion and affidavit of the defendant. Under such circumstances, it is a motion to the discretion of the Court. *United States v. Henry H. White*, 73.

VERDICT.

See REPLEVIN, 6, 7. *Walker v. Hunter*, 462.

WAGER.

1. A wager upon the event of a trial is void in law. *United States v. Lucretia Carrico*, 112.
2. See WITNESS, 4. *Ibid.*

WARRANT.

See CORPORATION OF WASHINGTON, 9. *Corporation of Washington v. Lynch*, 498.

WILL.

1. See EMANCIPATION. *Negro Bacchus Bell v. McCormick*, 398.
2. See FREEDOM, 3. *Negro George Coots v. Morton*, 409.
3. See DEVISE, 1. *McCoun v. Lay*, 548.
4. See APPEAL, 2. *Newton v. Carbery*, 626.
5. See EVIDENCE, 48. *Negro Ann Bell v. Greenfield*, 669.

WITNESS.

1. Upon trial of an indictment against the husband for assault and battery upon the wife, she was permitted to testify against him; upon the authority of the case of *United States v. Fitton*, at November term, 1835. *United States v. Negro Moses Smallwood*, 35.
2. See SLAVE, 1. *United States v. Negro Priscilla West*, 35.
3. See EVIDENCE, 2, 3, 4, 5, 6, 8. *United States v. Richard H. White*, 38.
4. A witness cannot be rejected because she had been provoked to bet upon the event of the trial. *United States v. Lucretia Carrico*, 112.
5. See BILLS AND NOTES, 5. *White v. Burns*, 123.
6. *Id.* 10. *Bradley v. Knox et al.* 297.
7. A witness, upon cross-examination, is not to be questioned as to any facts tending to disgrace him, which the party would not be permitted to prove *aliunde*. *United States v. Hudland*, 309.
8. See SENTENCE, 2. *United States v. Joseph Farrell*, 311.
9. Free colored persons, not born of white mothers, are not competent witnesses against a colored person born of a white woman. *United States v. Beddo*, 378.
10. See BILLS AND NOTES, 12. *Mason v. Masi*, 397.
11. See AUTHORITY, 1. *Welch v. Hoover*, 444.
12. See EVIDENCE, 27, 28, 29, 30. *United States v. Richard H. White*, 457.
13. A person who borrows checks payable to bearer, to raise money upon for his accommodation, but has not indorsed them, is a competent witness for the defendant, to prove usury. *Hill v. Scott*, 523.
14. See FREEDOM, 4. *Thomas v. Mackall*, 536.
15. See EQUITY, 36, 37, 38, 39. *Walker v. Parker*, 639.

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